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THE RECENT HIGH COURT RULES RELATING TO SECOND APPEALS.

The rules recently made on the above subject will come into force from the 15th August. There are several among us who will have to be taught the gist of these rules by the Appeal Examiner and his assistants over the signature of the Deputy Registrar on the Appellate Side. The aim of this article is not only to save practitioners on the Appellate Side, from this humiliating position, but also to enable professional gentlemen in the moffusil to give effective advice to their clients as to how to carry a matter up in Second appeal.

Practitioners in the muffusil Civil Appellate Courts will have to remember that rule 49 of the Civil Rules of Practice 1905, has been amended and added to in various particulars. On and after the 15th of August 1915, the said rule would read thus:—

Printing judgments, etc.

49. (1) When a copy of judgment or order passed by a Civil Court is applied for by a party to the suit or proceeding for the purpose of appealing against it to the District or Subordinate Judge's Court, the copy shall be printed, *provided* the length of the judgment or order (excluding the names of parties, and witnesses and the list of exhibits) exceeds 700 words. In cases where the length of the judgment or order does not exceed 700 words, the production of a printed copy is not compulsory.

When the plaintiff and defendant apply separately for copies of the same judgment, each must pay the full printing charges and each application will be dealt with by itself irrespective of the other.

(2) The general procedure in applying for such copy, and in disposing of the application shall be that laid down in the above rules relating to certified copies. The Superintendent, examiner or other officer shall calculate the charges required for printing the judgment or order, reckoning at the rate of 4 annas for every 175 words completed, and for the remaining words, 1 anna for every 50 words or fraction thereof. Four figures, or four simple letters used as abbreviations, shall be taken to be equivalent to one

word. The names of parties and witnesses and the list of exhibits shall also be printed and included in the charges according to the above rates. When tabular statements, genealogical trees and the like form an integral part of the judgment, they shall also be printed. A special rate for printing these shall be fixed by the Court concerned in each case, having regard to their length and complexity and the space they occupy.

(3) The applicant shall thereupon be informed, by notice of the amount payable by him for printing charges and for postage in cases where it is leviable under clause (7) *infra* in the same manner as he is now informed of the number of stamp papers required for a manuscript copy, and at the same time he shall be directed to pay that amount in cash by any means he may choose, direct to the authorized printer whose name and address shall be stated, within seven days of the date of the notice in default of which his application for copy will be struck off.

(4) The printer shall (ordinarily) supply four printed copies to the Court. On receipt of the four printed copies, they shall be authenticated and two copies shall be delivered to the applicant, one bearing an endorsement of dates, such as are endorsed upon manuscript copies, save that the word "*charges*" shall be substituted for the words "stamp papers" to be filed with the appeal and used at the hearing, and the second to be kept by the appellant for his own use. In computing limitation, the Court may allow, out of the seven days allowed for the payment of printing charges, as many days as it deems fit in each case as time requisite for obtaining a copy, if the printing office is five or more miles distant from the Court calling for the charges. The two remaining copies shall be placed with the records of the case, one to be given *gratis* to the respondent, and one spare copy for supply, also *gratis*, to a second or more respondents having separate interests in the subject-matter of the appeal, or for any other exceptional use. The costs of printing and of postage when it has been incurred under clause (7) *infra* shall be made costs in the appeal, and the appellate Court shall declare by an express order, whether they are to be borne wholly by the appellant, or by the respondent or respondents, or proportionately. and in what proportion by each party

If an appellant requires more than two copies allowed him by this rule, such extra copies shall be supplied to him on payment of charges calculated at a rate not exceeding one anna per page.

(5). When a copy of the judgment or order passed by an appellate Court is applied for by a party to the suit or proceeding or appeal for the purpose of appealing against it to the High Court, such copies shall likewise be printed.

On receipt of such application, the Superintendent, examiner, or other officer may, unless the applicant otherwise requests, call also for the judgment or order of the Court of First instance against which, judgment or order was passed in appeal, and shall collect the necessary charges for printing both. In such case the printer shall ordinarily supply eight printed copies, six of which shall be delivered to the applicant.

Out of the six copies delivered to him, he shall be charged for two of such copies at the rate mentioned in clause (2) above, and for the others he shall be charged at a rate not exceeding one anna per page.

If the applicant applies for more copies, or if any other party to the suit, appeal, proceeding or connected suit (in cases where there is one judgment or order for several connected suits) applies for copies before the order is issued for printing or within a week of the application, whichever is longer, such copies shall be supplied on payment of charges calculated at a rate not exceeding one anna per page.

If any application is made after such date, the full printing charges must be paid and such application will be dealt with irrespective of any other.

(6). In order to show cause, when required, why an appeal from an original order, or from an appellate decree or order should not be dismissed without notice under Order XLI, rule 11, (read where necessary with order XLII or Order XLIII rule 2) of the First Schedule to the Code of Civil Procedure 1908, a party may apply to the District or Subordinate Judge's Court to print a decree or any other paper or if it be not in the English language may present for printing a translation in English of the same, certified by his pleader to be a true translation; such applications shall be dealt with in the same manner as applications for the printing of appellate judgments, provided that printed copies can be delivered to the applicant with copies of the judgments for which he may have applied under the above rules.

(7). If the Court is more than five miles from the printer, the party applying for the copy shall pay for the postage, which like the printing will be taxed as costs in the case. A uniform rate of one anna for every 700 words shall be charged to the applicant for postage in addition to the charges for printing, and it shall be included in the notice given to him under clause (3) *supra* for payment direct to the printer.

A proviso has been added to Order XLII, rule 1, in the First Schedule to the Code of Civil Proceedure, which would read thus:—

ORDER XLII.

Appeals from Appellate Decrees.

The rules of Order XLI, shall apply, so far as may be to appeals from appellate decrees.

Provided that in appeals from appellate decrees, the Memorandum of Appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy, and also four printed copies of the judgment of the Court of First instance, one of them being a certified copy

The result is, every appellate judgment however short it may be in length, has to be printed if the matter is to be taken up to the High Court in second appeal, and the limitation provided in rule 49 (1) of the Civil Rules of Practice as to lengthy judgments alone being required to be printed for purposes of appeal would not apply to copies of original, as well as of appellate judgments, a printed certified copy of each of which it is imperative to file with the memorandum of every second appeal. When the original judgment exceeds in length 700 words and has to be printed for purposes of appeal, practitioners will do well to keep in mind the possible contingency of a second appeal and taking advantage of the second paragraph of sub rule (4) of rule 49 C. R. P. keep their clients fully supplied with the requisite number of printed copies of the original judgment required by the newly added proviso to Order XLII, rule 1 ; but when the length of the original judgment does not exceed 700 words, as well as in all cases where the appellate Court reverses or modifies the decree and in cases where it confirms the decree and the appellant has not taken the precaution above referred to, the original judgment will have to be printed as also the appellate judgment in the event of its being decided to prefer a second appeal. The newly added sub. rule (5) of rule 49 C. R. P. throws the burden of arranging to get the requisite number of copies printed upon the Superintendent, examiner or other officer connected with the copyist establishment of the moffusil civil appellate Court. Provision is also made for the necessary printing (1) when more persons than one desire to prefer independent second appeal from the same appellate decree, and (2) to meet cases of batches of appeals covered by a single leading judgment.

It is however strange that those responsible for promulgating the new rules have in their wisdom seen fit to bring into operation the addition to Order XLII, rule 1, of the First Schedule to the Code of Civil Procedure on the same date as the amendment of rule 49 of the C. R. P. ; but the oversight seems to be almost providential, because we learn more by committing mistakes and subsequently realising that we have gone wrong than by doing the right thing at the right time in the right manner by a sort of blind instinct. A period of at least six months must elapse, having regard to the delay necessarily incidental to getting papers printed through the Court establishment in a moffusil station

and to the provisions of article 156 of the First Schedule to the Limitation Act, between the very first application under rule 49 (5) of the Civil Rules of Practice and the first act of compliance with the proviso to Order XLII, rule 1 C. C. P. However, the notification as it appears at p. 1271 in Part II, of the Fort St. George Gazette of July 6th 1915 admirably serves to bring out the very intimate connection between the moffusil printing establishment and the procedure prescribed for filing second appeals under the new rules. This close connection is further emphasised by rule 49 (6) of the C. R. P., which provides for the printing (from the originals or from translations certified by the pleader to be a true translation) of any portion of the record required by a party who apprehends that his appeal or second appeal might be posted under Order XLI, rule 11, (read where necessary with Order XLII or Order XLIII rule 2 as the case may be) in order to show cause why it should not be dismissed without notice being served on the respondent. But this proviso is purely enabling. If the party has not taken steps to get the necessary papers printed under rule 49 (6) of the C. R. P., rule 42 of the rules of the High Court Appellate Side as recently amended provides for typed copies of selected portions of the evidence being put into Court along with the memorandum of Second Appeal. The privilege however of putting in a translation of a record which is not in English is not, for obvious reasons, extended to parties appealing in person. Rules 42 and 43 of the Appellate Side rules as recently amended, would read thus :—

42. (1) When presenting the memorandum of the grounds of appeal from an appellate decree, or order, the appellant or his pleader shall also present (1) printed or typed copies of the decree or order of the Court of First Instance and (2) printed or typed copies of all papers on which he intends to rely, should the appeal be posted for hearing under Order XLI, rule 11, read where necessary with Order XXII or order XLII, XLIII rule 2, of the First Schedule to the Code of Civil Procedure, 1908.

Provided that where any paper on which the appellant intends to rely is not in the English Language and the appellant appears by pleader, printed or typed copies of English translations thereof, certified by the pleader to be correct translations, may be presented in lieu of copies of such original paper.

(2) The provisions in Clause (1) *supra* shall apply as far as may be necessary to appeals from an original order.

43. The Registrar may post any appeal from an appellate decree or order before a Bench of two Judges for hearing under Order XLI, rule 11, read where necessary with Order XLII, or Order XLIII, rule 2 of the First Schedule to the Code of Civil Procedure, 1908. Notice of the date of such hearing shall be given by posting a list of appeals to be so heard on the notice-board of the Court three clear days before the date of hearing.

To sum up:

The connection of a moffusil professional gentleman with a civil suit does not cease with the decision of the Court in which he practises. A pleader ordinarily practising in a Munsiff's Court, with a little foresight and a trifling expense to the party could save considerable time and cost, if he would apply for a sufficient number of extra copies under the second pragraph of rule 49 (4) of the C. R. P.

There is no reason why this provision should be confined to an appellant from the original decree. Why should not the successful party in the Court of first instance be allowed to take advantage of it, should he be driven to prefer a second appeal by reason of an adverse decision in the appellate Court, especially when a similar provision is made in rule 49 (5) C.R.P. as regards the successful party in the appellate Court obtaining printed copies under that sub rule ?

A pleader in an appellate Court, if he is unsuccessful can no longer satisfy his conscience in the old fashioned way, by merely telling his client to go to Madras where he will readily get justice. While the facts and the merits of the case are still fresh in his mind, he will have to decide in the light of the appellate judgment, whether he could in all conscience advise a second appeal being filed or at all events advise the party who has lost in the appellate Court to incur additional expense with a view to preferring a second appeal. If a second appeal is to be preferred, an application for a printed copy of at least the appellate judgment should be lodged immediately, and no one is better qualified to advise the party as to the chances of success in a second appeal than the pleader who has studied the case in the appellate Court and heard his opponent and listended to the pronouncement of the appellate tribunal on the entire merits of the case. There can be no doubt that practitioners in the moffusil appellate Courts are pre-eminently qualified to discharge these functions calmly, especially after they have had

sufficient time to cool from the ardour and zeal incidental to forensic advocacy. If this duty is conscientiously discharged, parties who have lost in the appellate Courts will no longer be allowed to shift for themselves and incur the heavy burden and expense necessarily incidental to the maintaining of a second appeal more often from a spirit of pure gambling than from the fact they had received competent legal advice that they have reasonable chances of success in the High Court. As regards the new sub rule (6) of rule 49 C. R. P. if any document had been misconstrued or improper legal inferences drawn therefrom a practitioner who has argued in the appellate court is undoubtedly best qualified to supply the High Court with a list of such documents together with true translations, where necessary. There can be no doubt that he will discharge this duty faithfully, more especially if he knows that his selections and translations will be tested in the light of those put forward on behalf of the opposite party when the second appeal is heard under order XLI, rule 16, read with order XLII or Order XLIII rule 2 as the case may be.

It may be also suggested that in important cases as soon as the appellate judgment is delivered, two applications for copies may be made, one for a manuscript or typed copy of the appellate judgment alone for the purpose of seeking legal advice as to the desirability of preferring a second appeal, the other for a copy of the appellate decree and the requisite number of printed copies of the judgments. If care is taken to omit from the first application the copy of the appellate decree, time will not count and Counsel's opinion can be easily obtained on the manuscript copy of the appellate judgment long before the copies for the purposes of the second appeal are ready.

After the 15th of August, or such extended time as the High Court might find it necessary hereafter to fix, practitioners in the High Court will bear in mind the proviso to Order XLII rule 1 under which the enclosures that ought to accompany a memorandum of second appeal are

(*a*) One copy of the appellate decree

(*b*) four printed copies of the appellate judgment (one certified)

(c) four printed copies of the original judgment (one certified)

(d) one printed or typed copy of the original decree

(e) printed or typed copies of such portions of the evidence (including translations certified by the pleader) sought to be relied on should the second appeal be heard under Order XLI, rule 11, read with Order XLIII

(f) An ordinary T. & P. application as under the existing practice.

It is needless to add that out of the four copies of the original or appellate judgment, the certified copies alone require to be stamped under Art. 6, of the First Schedule to *the Court Fees Act.*

The members of the profession will also do well to note what appears at first sight to be sheer waste of energy and resource, if papers already printed under rule 49 C. R. P. are to be reprinted at any stage of a second appeal. If the profession, on behalf of the litigant public, would stir in the matter, it ought not to be impossible to provide that what is printed under rule 49, is sufficient to serve all concerned at all the stages of a second appeal and the introduction of some provision of Law with this object in view would save the litigant considerable time and expense.

S. SWAMINADHAN.
8—7—15

SUMMARY OF ENGLISH CASES.

Stickney v. Keeble: (1915) A. C. 386.

Contract for sale of land—Time not of the essence of contract, meaning of the rule—Long delay—Right to party to fix time—Judicature Act—Effect of.

This case contains an explanation of the equity rule that time is not of the essence of the contract in the case of agreements for the sale and purchase of real estate.

Whereas Courts of law always held the parties to their bargain in this respect with the result that if the vendor was unable to make a title by the day fixed for completion, the purchaser could treat the contract as at an end and recover the deposit, equity having a concurrent jurisdiction, whenever it could do so without injustice to the contracting parties, decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This was all the meaning of that maxim, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties when for instance the parties had stipulated that the time fixed should be essential, or there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.

It was only for the purposes of granting specific performance that equity in this class of cases interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract or had by his conduct lost the right to specific performance had no equity to restrain proceedings at law based on the non-observance of the stipuulation as to time.

Accordingly, to an action for return of deposit, the vendor would have no defence if after the suit he sells away property to third party, as there could be under the circumstances no question of specific performance.

The Judicature Act has made no difference in the matter. Even now, if the court is asked to disregard a stipulation as to time in an action for common law relief and it be established that equity would not under the then existing circumstances have prior

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to the Act granted specific performance or restrained the action that section can have no application.

One application of the rule that equity will not interfere when there is injustice is that although the vendor's conduct may not under the circumstances be alone sufficient to disentitle him to specific performance, yet if he has been guilty of unnecessary delay and the purchaser has served him with a notice limiting a time at the expiration of which he will treat the contract as at an end equity will not after the expiration of such time, provided it is a reasonable time, enforce specific performance or restrain an action at law.

In considering whether the time given was reasonable or not, this fact has to be taken into consideration, that the defendant had to purchase the property which could only be done after carrying out certain other sub-purchases and that all this required time was unnecessary unless it could be shown that the plaintiff had consented to the agreement being carried out in that manner.

Jureidini *v.* **National British and Irish Millers Insurance Company, Limited,** (1915) A. C. 499.

Arbitration clause—Fire insurance policy—Effect of repudiation of liability under.

One of the clauses in a fire insurance policy was that if the claim was fraudulent or the loss was caused by wilful default, all benefits under the policy should be forfeited. Another clause was that any difference as to loss was to be first referred to arbitration. In this case the Company repudiated the claim on the ground of fraud.

Held, that the Company having altogether repudiated its liability, could not plead the arbitration clause as a bar to an action on the policy.

Glasgow and South-Western Railway Company *v.* **Boyd and Forrest,** (1915) A. C. 526.

Contract—Rescission on the ground of mistake—Performance with knowledge of facts entitling—Effect of.

A claim for rescission of contract by the contractors on the ground of essential mistake is unsustainable when with notice of facts the contractors have chosen to execute the work

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Trustees of the Harbour of Dundee *v.* **D. and J. Nicol:** (1915) A. C. 550. (Scotch Case).

Corporation—Powers— Ultra vires*—Title to sue—Legal relation—Instances of—Right of rate-payers of harbour trust to prevent* ultra vires *act of trustees.*

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The law as it stands is that a statutory corporation has no power which it has not been either expressly or impliedly been given by the statute creating it. The question is simply one of construction and not of presumption. *Held, accordingly,* that a statutory body of harbour trustees who were given a franchise of ferry within certain limits could not let out the boats for excursion trips beyond the ferry limits when the boats were not required for the ferry traffic.

Discussing the question as to whether the plaintiffs in the case, a firm of shipowners who let out steamers for excursion trips and paid rates to the trustees for the use of the harbour, Lord Dunedin said that the English law in this matter bristles with difficulties having their origin in the rigid rules of common law actions with subsequent modifications by equity and statute law and was not of assistance in determining the Scotch Law on the subject. According to that law for a person to have a title to sue, he must be a party (using the word in the widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies. As instances of that legal relation, the learned Law Lord gives ownership, contract and fiduciary relationship. The plaintiffs in this case in the capacity of harbour ratepayers being also members of the constituencies erected by the Act of Parliament to elect the trustees and as such also persons for whose benefit the harbour is kept up, his Lordship held that they had a right to prevent an *ultra vires* Act of the defendants. In coming to a conclusion in favour of the plaintiffs, their Lordships were influenced to a large extent by the fact that under the Scotch Law there was no procedure of actions by relation of the Attorney-General as obtains in England.

Attorney-General of Southern Nigeria *v.* **John Holt and Company:** (1915) A. C. 599. (P. C.)

Easement—Categories capable of Explanation—Storage right—Enjoyment as owner—Not sufficient to claim—Easement—

Accretion— Application — Foreshore rights — Abandonment of —Irrevocable license—Doctrine of — Artificial reclamation —prevents.

The category of servitudes and easements must alter and expand with the changes that take place with the circumstances of mankind applying this dictum of Lord St. Leonard's in *Dyce* v. *Hay* [1], their Lordships held that there could be an easement to store goods. Their Lordships held however that when the right was all along exercised only in assertion of the right of ownership, such enjoyment could not be the source of acquisition of an easement right; the defendants having reclaimed the foreshore and made costly erections and enjoyed for a long time storage and other valuable rights, in the circumstances of the case, their Lordships held that a license to do the acts should be presumed which had become irrevocable by the construction of costly works on the basis of such license.

Considering the doctrine of accretion which came for discussion in the case, their Lordships point out that while its application is not excluded by the fact that the grant of the land abutting the foreshore is by measurement, it required that the growth must be slow, natural and imperceptible in its progress and could not comprehend cases of silting up by artificial reclamation.

The abandonment of rights annexed to land is a question of intention and their Lordships were unable to infer an intention to abandon the special foreshore rights vested in the *frontagers* by the mere fact that he had reclaimed a portion of the foreshore when they were using the reclaimed land for purposes of storing their goods and affording facilities of transport, etc., to the sea.

Balmukund v. King-Emperor: (1915) A. C. 629.

Privy Council—Not a Court of Criminal appeal—No power to suspend execution of sentence.

The Privy Council is not a Court of Criminal Appeal and could not stay execution pending the hearing of the petition for special leave. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the executive Government and is outside their Lordship's province.

1. (1852) 1 Macq. 305.

The King v. Robinson (1915) 2 K. B. 342 C. A.

Offence—Attempt to Commit—Preparation for—Distinction—attempt to obtain money by false pretences—Direct communication to person intended to be defrauded or to his agent, if necessary.

There must be some act beyond mere preparation if a person is to be charged with an attempt. A person cannot be convicted of attempting to obtain money by false pretences where there is no evidence of the false pretence having been made to the person intended to be defrauded or to his representative. It is not enough to show that the accused made the false pretence to a third person with the object that the latter will report it to the person intended to be defrauded.

Gunyon v. South-Eastern and Chatham Railway Companies' Managing Committee (1915) 2 K. B. 370.

Railway Company—Contract of Carriage—Construction—Consignment by Passenger train at "Owner's risk"—Carriage by Goods train—Delay—Loss—Liability of Railway Company.

Where a railway company has promised to perform the conveyance in a certain manner with an attendant right to take advantage of certain stipulations made in their favour, they cannot put upon the consignor a mode of conveyance which he has not contracted for and yet retain in their own favour the stipulations referrable to the agreed mode of conveyance only.

The plaintiff consigned fruit by passenger train from S. station on defendant's railway to Glasgow, at reduced rates and at owner's risk on the terms of a consignment note which relieved the defendants "from all liability for" amongst other things, "delay... except upon proof that such delay arose from wilful misconduct on the part of the defendant's servants. The carriage from S. station to London was duly performed by passenger train, but from London to Glasgow, it was performed by Goods train. As a result, the fruit arrived damaged, for which loss the plaintiff sought to recover damages from the defendants. *Held*, that the term providing for carriage by passenger train was of the essence of the contract that, when in London the fruit was shipped on a Goods train, the contract was no longer being performed, and the goods were no longer being carried at "owner's risk", that therefore the plaintiff was not under an obligation to prove that his

loss was caused by the wilful misconduct of the defendant's servants and that judgment should be entered for the plaintiff.

The King v. Hopper (1915) 2 K. B. 481 C. A.

Criminal trial—Trial with jury.—Duty of Judge to direct Jury on question arising out of evidence, although not relied upon by counsel for accused.

Whatever the line of defence adopted by counsel at the trial of a prisoner, it is for the Judge to put to the jury such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself.

Where at a trial for murder, counsel for the accused relied substantially on the defence that the killing was accidental, but indicated quite clearly before the Judge came to sum up that although he was raising the defence of accident, he was not giving up the defence of manslaughter, and that he intended to claim a verdict of manslaughter if he did not succeed in obtaining an acquittal on the point of accident, and there was some evidence to justify the jury to find a verdict of manslaughter; *held*, that the question as to the crime being manslaughter only ought to have been left to the jury, and that the Judge was wrong in directing them to find the prisoner guilty of murder, if they thought the killing was not accidental.

Clare and Co., v. Dresden Bank. (1915) 2 K. B. 576.

Banker and Customer—Relation of—Nature—Account at one branch—Demand for payment at another branch—Refusal to pay—Action by customer against Bank—Maintainability.

Locality is an essential part of the debt owing by a banker to his customer, and his obligation to pay is limited to the place where the account is kept.

A customer having an account at one branch of a bank in one place is not entitled to demand of another branch of the same bank situated in another place, payment of the balance due on the account at the former branch and, upon refusal to pay, sue the bank without having made any request to the former branch to pay or to remit the balance to the latter branch.

Difference between the relation of debtor and creditor and that of banker and customer pointed out.

JOTTINGS AND CUTTINGS.

The Bar in Alien enemy cases.—The Lord Chief Justice, at the sudden close of the Kuepferle spy trial, made some timely observations on the functions of the bar. 'It is in accordance with the honourable traditions of the bar,' he observed, 'that even a charge so odious as that of spying in the interests of the enemy should meet with a proper defence.' And he proceeded to remark that the counsel who had appeared for the defence had 'acted in the highest public interest in so doing.' This deserved to be said, not merely because members of the bar must now frequently be engaged in the defence of persons who are found to be the enemies of their country, but also because an attempt has recently been made to revive the mischievous fallacy that an advocate ought to be satisfied that his client is in the right before he undertakes to represent him in Court. That, happily, has never been the view on which English advocates have acted. 'If', said Erskine, in his famous defence of Thomas Paine, 'an advocate refuses to defend from what he may *think* of the charge, he assumes the character of the Judge; nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy inference of, perhaps, mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English Law makes all presumptions'. A prisoner, no matter how odious the charge brought against him is, according to the English principle of Justice, deemed to be innocent until he is convicted, and members of the bar would show a complete disregard of this time-honoured principle, as well as the most honourable traditions of their calling, were they to refuse to defend an alleged spy, or, indeed, to represent any cause merely because it happened to be unpopular—*The English Law Journal June 5, 1915.*

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The Functions of the Advocate:—Members of the bar are not the agents of their clients; they go into Court to assist it to ascertain the truth. As Sydney Smith put it, in a famous assize sermon he preached at York in 1824, 'Justice is found, experimentally, to be most effectually promoted by the opposite efforts of practised and ingenious men presenting

to the selection of an impartial judge the best arguments for the establishment or explanation of truth.' The mischievous theory that an advocate ought, by some original investigation, to decide that his client is innocent before he defends him in Court, is derived from Jeremy Bentham, who went the length of regarding the advocate of a guilty prisoner as his 'confederate' and 'accomplice.' But Bentham was inclined to hate all lawyers, because they were reluctant to support his proposals for reforming the law, some of which were not of great practical value. He was apt to regard judges, barristers and solicitors as associates in a conspiracy to defeat the ends of justice, and, growing scurrilous as he proceeded from false premises, he vilified and defaced until he left.

Not even Lancelot brave, nor Galahad clean.

Dr. Johnson had a much better notion of the functions of the advocate. When Boswell asked him, 'what do you think of supporting a cause you know to be bad?' the Doctor replied, 'Sir, you do not know it to be good or bad till the Judge determines it. It is his business to judge, and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.' That is really the conclusion of the whole matter. The famous layman knew better than the distinguished jurist. The mischievousness of the Benthamite theory is that, were it adopted, an undefended prisoner would practically be condemned before he was tried. 'There is, 'as Lord Hannen once remarked in the Divorce Court, 'an honourable way of conducting the worst of cases'.—*Ibid.*

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Lawyers in the Ministry. Two more Lawyers have been added to the Ministry. Lord Robert Cecil, who has succeeded Mr. Neil Primrose as Under-Secretary for Foreign Affairs, and Mr. Hayes Fisher, who has taken the place of Mr. Herbert Lewis as Parliamentary Secretary to the Local Government Board, are both members of the Inner Temple. Both, too, have in their veins a rich flow of legal blood. Lord Robert's mother was the daughter of Baron Alderson, one of the judges whose names adorn the list of Senior Wranglers. He had, among mo

judicial gifts, the habit of dropping into poetry, and whilst a flourishing junior on the Northern circuit he wrote an 'Ode to Adversity,' which, after bidding that Sombre goddess not to intrude upon his haunts, concluded with the following cheerful stanza :—

But' stead of Thee let business come,
Attached by the ceaseless hum,
Of motions, briefs, appeals,
How sweet her voice, how fair her mien,
While in perspective dim are seen
King's counsel and the Seals.

Though it was never Baron Alderson's lot to see 'The Seals' except in 'perspective dim'; he established a great reputation as an able and impartial judge. He presided at the trial of the Chartist prisoners, who thanked him from the dock for the fairness which he had displayed towards them. Mr. Hayes Fisher, like Lord Robert Cecil, derives his legal instincts from the maternal side. He is a grandson of William Hayes, whose fame as a conveyancer has survived even the many drastic changes which have been made in conveyancing since he practised the art in Lincoln's Inn.—*The Law Journal, June 5, 1915.*

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"*De Minimis.*"

Lord Haldane acted as Lord Chancellor for only three years. During that period, however, he was called on to exercise a large amount of patronage. We believe we are correct in stating that Lord Haldane appointed Lord Dunedin, Lord Moulton, Lord Parker and Lord Sumner to the House of Lords. Sir Walter Phillimore, Sir William Pickford, Sir John Elden Bankes and Sir Thomas Warrington all owe their appointments to him. His Lordship has also appointed a large number of High Court Judges *viz.*, Lord Reading, Mr. Justice Sargant, Mr Justice Astbury and Mr. Justice Younger, Mr. Justice Rowlatt, Mr. Justice Bailhache, Mr. Justice Atkin, Mr. Justice Shearman, Mr. Justice Sankey and Mr. Justice Low. With one exception public and professional opinion has approved of these appointments.

Lord Haldane, rumour says, will in future devote himself to the work of the Judicial Committee of the Privy Council. This is good news. His Lordship is credited with imperialistic views as to the Judicial Committee. No doubt he will do much useful work in reforming that body, but we trust that any alteration of

that august body will only be effected with the entire approval of all parts of the British Empire.

Sir Stanley Buckmaster has attained the Woolsack at an early age. Without in any way disparaging his high legal attainments, this success is due to a certain extent to "luck." His Lordship has not been too strong in his politics—not offensively strong. No doubt the claim of Sir Robert Finlay would have secured him the coveted post for which he has so long been marked, but Sir Robert is strongly Conservative. The national and political necessities of the moment called for a man not too strongly partisan. Personally, we thought Lord Parker would have been selected. The new Lord Chancellor will, no doubt, worthily uphold the great traditions of the office, but the reasons for his appointment afford another proof, if any is needed, of the curious system of government under which this country lives. The highest legal office in the kingdom should surely go to the nation's most learned and most esteemed lawyer, apart from his political views.

Sir John Simon has chosen a political career. No man has ever before refused the Lord Chancellorship for the post of Home Secretary. Sir John Simon evidently aspires to lead his party.

The fact that Sir Stanley Buckmaster presided over the deliberations of the House of Lords for some little time before he had obtained his peerage brings out what is sometimes forgotten, that there is no legal necessity that the Lord Chancellor should be a peer, and that even a commoner holding that office can act as Speaker of the House of Lords. True, he cannot address the House, for, unless the holder of a peerage, he is not a member, but he can adorn the Woolsack and preside from thence, for that article of furniture is not technically within the limits of the House.

Mr. Asquith, according to the *Globe*, is credited with thinking of an interesting experiment before he decided upon Sir Stanley Buckmaster's promotion to the Woolsack. He contemplated, it is said, choosing for the exalted office a Lord of Appeal-in-Ordinary, whose politics were quite unknown. Had Lord Parker been appointed he would have been the first Lord of Appeal to become Lord Chancellor. There would, however, have been nothing novel in choosing a Lord Chancellor from the ranks of

the Judges. Until comparatively recent times, indeed, it was the common practice. Of the sixteen Lords Chancellors who have held office since the beginning of the Victorian era, half reached the Woolsack with judicial experience gained in lower offices. Lord Lyndhurst and Lord Cottenham were Masters of the Rolls; Lord St. Leonards was Lord Chancellor of Ireland; Lord Truro and Lord Campbell were Chief Justices; and Lord Cranworth, Lord Cairns, and Lord Hatherly were Lords Justices. Not since 1856, when Lord Hatherley was appointed, has there been a promotion from the Bench to the Woolsack.

Many persons would have been delighted to have had Lord Parker as Lord High Chancellor.

The United States Judges must have plenty of time on their hands. The verbosity of their decisions distinctly proves that they are not "hustled." In *Graham* v. *State* [1], decided by Georgia Court of Appeals, we read the following judgment: "While the indictment described the cow as 'one blue and white speckled' cow, this description would include equally well a cow which was black and white speckled, since it is a matter of common knowledge that literally speaking, no cow on this mundane sphere is actually 'blue,' though cows of that color may possibly browse through the valleys of the moon, graze along the banks of the canals that seem the face of the planet Mars, or disport themselves in the realms of fairyland."—*Law Notes, July, 1915.*

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Bombardment and the Three-mile Rule.—One, at least, of the propositions of law which will need revision in the light of the experience of the present war is that which goes to so fundamental a question as the limits of the jurisdiction of the State and the bounds of its sovereignty. The rule that this extends only to three marine miles measured from low-water mark is now of universal acceptance, but it was not settled without opposition. The extravagant claims of fifteenth-century monarchs to whole oceans were combated by Grotius in his *Mare Liberum*; and what he achieved by his destruction of the groundwork of theory was completed in practice by the advance of commercial intercourse. The Behring Sea Arbitration of 1893 between Great Britain and the United States marks the last determined attempt of a Great

1. 84 S E. 981.

Power to assert some of the older pretensions to sovereignty over the open sea. In 1870 the famous case of *Regina* v. *Keyn* raised in an acute form the question whether, assuming the three-mile jurisdiction to exist in international law, it could be deemed incorporated into English law without an Act of Parliament, a majority of the Court holding that an Act of Parliament, would be necessary. The Territorial Waters Jurisdiction Act of 1878 conferred this jurisdiction on the Crown for the future, and declared that it had existed in the past. In spite of certain attempts to extend the State jurisdiction to six miles, notably that of the Institute of International Law (Annuaire, XIII., p. 281), the three-mile limit is on the whole generally adopted. The purpose of the jurisdiction is every where fundamentally the same—namely, self-preservation. And the test was laid down by Bynkershoek, writing in the 18th century, in the well-known maxim *terrae potestas initur ubi finitur armorum vis.* In other words, the firing-range of that period being three miles, the extent of control has remained at that point, irrespective of the developments of gunnery. The question then arises whether, in face of the new knowledge gained in the present war, a complete revision of this outworn principle will not be imperative. We know now, for example, that the *Blucher* was sunk by the British Fleet at a range of 17,000 yards; that some of the Dardanelles forts were bombarded at a range of 13 miles; while there has been free talk of some portentous German guns which, mounted on platforms, could sweep the Straits of Dover. It is clear, as Westlake had already pointed out (Int. Law 1913, p. 189), that the old rule has now entirely lost all its meaning. It may well be that one result of the war will be an international convention between all those States which have a coast-line by which the area of jurisdiction and control over territorial water is extended and adapted to the new conditions.

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Lawyers and War.—WHY is it that Great Britain has not exerted her might in the war as vigorously as some of her impatient sons had hoped? Mr. F. S. Oliver, in his new book, 'Ordeal by Battle,' finds the explanation in 'the superfluity of lawyers in the Cabinet.'

Lawyers see too much of life in one way, too little in another, to make them safe guides in practical matters. Their experience is made up of an infinite num-

ber of scraps cut out of other people's lives. They learn and do hardly anything except through intermediaries. . . . The shopkeeper who blunders in his buying or his selling, or the manufacturer who makes things as they should not be made, suffers painful consequences to a certainty. His error pounds him relentlessly on the head. Not so the lawyer. His errors are for the most part visited on others. His own success or non-success is largely a matter of words and pose.

What exactly Mr. Oliver means by saying that a lawyer's 'success or non-success is largely a matter of words and pose,' we are unable to fathom. They can have not the slightest meaning for the members of that branch of the legal profession to which Mr. Lloyd George belongs. Nor, we imagine, will any solicitor read what Mr. Oliver says about the errors of the lawyers beng visited on others without remembering that he is liable, if he commits a mistake, to have an action for negligence brought against him. 'A Government of lawyers,' we are told, 'is likely to be blind to the facts, because it is not accustomed to deal with facts.' Was Mr. Oliver ever in a court of justice? He would know, if he had been, that facts, and not law, are the main theme of argument at the Bar. He would appear to propound the startling theory that men who are, accustomed to deal only with their own concerns are better qualified to guard the interests of the State than are men who are accustomed to handle the affairs of others. Where are these superior persons to be founded? The presence of many lawyers in Parliament does not prevent them from making their genious for government known to the public. Were More, Selden, Somers, Pitt—to name only a few of the lawyers who have defended the liberties of England—blind to facts. The prejudices which Mr. Oliver expresses were once put into pratice. What was the result? The House of Commons from which lawyers were excluded is pilloried in history as the *Parliamentum Indoctum*.—*The Law Journal, June 19, 1915*

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Miscellany.—The office of Lord Chancellor of Ireland, which has been the subject of so much controversy in connection with the formation of the Coalition Government, is (says the *Globe*) one of the best paid judicial posts in the United Kingdom, though three or four years ago the salary was reduced from 8,000*l.* to 6,000*l.* a year. The Lord High Chancellor, whose salary is 10,000*l.* and the Lord Chief Justice, to whom a grateful country pays 8,000*l.* a year, are the only occupants of judicial offices who receive a larger salary. The six Lords of Appeal-in-Ordinary and the Master of the Rolls

receive the same amount as the Lord Chancellor of Ireland. Scotland's chief judicial officer, the Lord President of the Court of Session, is made to realise that he belongs to a thriftier race by receiving 1,000*l.* a year less. The Irish Lord Chancellor is entitled to a pension of 4,000*l.*—a generous allowance to which Lord Campbell, who was Lord Chancellor of Ireland before he became the keeper of his Sovereign's conscience, renounced his right.

LORD CAMPBELL is not the only famous English lawyer who has held the Irish Lord Chancellorship in modern times: Lord St. Leonards is another occupant of the Woolsack who served a kind of apprenticeship in the Emerald Isle. At one time it was customary to appoint a member of the English Bar to preside over the Irish judicial system. Reciprocity, however, was not among the virtues of the English Bar in those days. Mr. Atlay, writing of the appointment of Lord St. Leonards to the Lord Chancellorship of Ireland in 1835, says : 'Yet only a few years previously Plunket had been compelled to surrender the Mastership of the Rolls in England on account of the feeling at the English Bar against a member of the Irish Bar being appointed to an English judicial post.' The office of Lord Chancellor of Ireland was, in truth, usually given to some influential lawyer whose claims to promotion could not otherwise be satisfied. 'The Irish Lord Chancellorship,' wrote Lord Campbell, 'would not by any means be a desirable destiny for me, but it is better than anything else that is open.' That was the spirit in which it was accepted as a rule. No wonder the practice of appointing English lawyers came to an end.—*Law Journal, June 19, 1915.*

CONTEMPORARY LEGAL LITERATURE.

The Harvard Law Review for April opens with appreciative notices of Professor Gray, the author of the well-known book on Perpetuities from Professors Thayer, Willinston and Beale. He preferred Professorship in the University to a judgeship in the Supreme Court and so long as there was strength in him, loved to learn law and lecture law.

Mr. Meclair discusses the extent to which it is permissible under the law to *contract out of liability for negligence.* It appears from the discussion that there is no general con-

currence of views on the part of the courts in a broad proposition that apart from Public Service undertakings an antecedent contractual release from liability for negligence which has no characteristic of wilful or intentional wrong is void; while the Public Service cases only indicate a general concurrence of view that obligations to those who are entitled to such service cannot be reduced by any such stipulation. Mr. Charles G. Haines compares the Canadian constitution with the American constitution with special reference to *judicial review of legislation*. Notwithstanding the dissent of some eminent judges and writers, Mr. Haines thinks with Professor Dicey that there is great resemblance between the United States Constitution and the Canadian, this feature, *viz.*, the principle of judicial review being one of the features borrowed from the former. The careful distribution of all legislative power between the Federal and the Provincial legislatures, unlike the United States constitution the residue of powers being in the Federal legislature and not in the Provincial legislatures the absence of a bill of rights circumscribing legislative power and the power of veto vested in the Federal Government limit the scope for judicial review in Canada.

Mr. Arthur March Brown discusses the views of various Judges in the United States as to *comity*—the word used there for deference to decisions of other courts of Co-ordinate jurisdiction and expresses the hope that notwithstanding the independence of action which some Judges have claimed for themselves, the courts will work out a policy of harmonious action among those jurisdictions in order to evolve a consistent system of national jurisprudence. As the writer says, in yielding to such constraint, the Courts are not belittling themselves, rather do they gain in dignity thereby.

In the American Law Review for May and June, Mr. James W. Earner discusses the rule as to *the transfer of merchant vessels from belligerent to neutral flags*. The old English, American and Austrian rule was that such transfers were good if *bona fide*, *i. e.*, with the intention of passing property completely and the motive namely that it was to elude capture by the enemy was immaterial. The French, Russian and German rule on the other hand was that such transfers were illegal and did not prevent capture as enemy ship. The declaration of London enacted a new rule that such transfer was valid if *bona-fide*, the burden of proving

bona-fides being on the purchaser. It also enacted that a transfer with the object of eluding capture by the enemy was invalid. Applying this rule to the case of the *Dacia*, the writer argues that the transfer being while in a neutral port, it could not be said that it was to elude capture and if the contrary is held, he thinks the consequence would be no transfer could be considered legal. He contends also that France having ratified the *declaration* with certain modifications which do not bear on this question, she is bound by its provisions and cannot go back to the old French rules.

Mr. Charles Sumner Lobingier very cogently argues for the introduction of Roman Law as the initial subject in the law curriculum. According to him, the transition from the subjects of the arts course will be felt least burdensome if the Roman Law is made to lead students to the more technical study of law. The value of Roman law consists not only in its being the source of many of the legal rules extant but also in its being the source of all fundamental juridical conceptions and a veritable mine of legal phraseology and its supplying a model for studying legal development. The writer shows how even the well known presumption in criminal trials in favour of innocence owes its origin to Roman Law. The indebtedness of international law to Roman jurisprudence is well known while the mercantile law and maritime law are largely based on it. If as Sir Henry Maine believes Emphyteusis is the origin of the Feudal System, even the real property law would be indebted to Roman Law. The Marriage law is largely based as Canon law which is but a modified form of Civil law. The protest of Chief Justice Cockburn, notwithstanding as the Judgment of Lord Holt shows, the law of bailment is founded on Roman law. The extent to which the law of guardianship is under obligation to Roman law, it is not easy to determine but there is no denying that it was to some extent at least influenced by it. The other great jurisprudence of the world, *viz.*, the Mahomedan jurisprudence is also an adaptation of the Roman law to Mahomedan conditions.

In the Michigan Law Review for April, Mr. Theodore P. Ton exposes some of the arguments of Dr. Dernburgh that the treaties of guarantee with respect to Belgium and Luxemburgh were never considered as absolutely binding on the contracting

parties by reference to the speeches of Gladstone in 1870—71 on which reliance was placed by the former. What was said by Mr. Gladstone was that though England had the right to interfere in support of Belgium when her neutrality was violated, there was no such absolute duty to intervene irrespective of the circumstances; for instance the condition in which England finds herself. The writer very rightly asks in addition—apart from any treaty, what right had Germany to enter Belgium without her permission. He points out the futlity of the plea of Germany that she had agreed to indemnify Belgium if she gave free passage when it is remembered what guarantee there was in that event of the allies not invinding the Belgium territory.

In the same Review for May, there is an interesting account of religious corporations in America. The two original forms were the territorial parish and the corporation sole. These were developed before the Revolution as part of the religious establishment then in vogue. The territorial parish was a curious kind of corporation; for the debts of the corporation, the property of any member could be seized. There was also no way of excommunicating a member. The corporation sole had this disadvantage *viz.*, there was a period between the death of one officer and the election of the other when the property was in abeyance and the gratest confusion prevailed.

In their place, three new forms have grown up, the corporation aggregate, the trustee corporation and the modern form of corporation sole of these the first fills the needs of churches with a congregational form of Government while the corporation sole serves the necessities of Churches whose form of Government is episcopal *i. e.*, to say the bishops who are elected according to the rules of their curches are permitted to declare themselves to be corporation sole. The trustee corporation presents the ideal means of corporate existence for churches that occupy an intermediate position where certain officers of voluntary associations are declared to be trustees so as to enable them to hold property. In addition to these forms, the Roman Catholic Church is another from.

In another article of interest Mr. Bingham discusses the nature and importance of legal possession.

Mr. Harriette M. Dilla says that there is need for a more careful study of the *sociological aspects of Criminal law.* Taking

the case of mental infirmity, he says that 30 % of the imbeciles become so by causes operating after birth 5% at or about birth, 30% by antenatal causes *i. e.*, to say by heredity, epilepsy, venereal disease, drunkennes or imbecility of parents. He says that careful differentation is necessary among criminals according to the causes, instructibility, age, etc., of the criminals and wherever the criminals are incapable of improvement they must be segregated and must be permanently confined or otherwise prevented from handing down their characteristics. He deplores the in trusion of politics in the selection of Superintendents which is responsible for much of the inefficiency of these institutions.

The causes of the inefficiency of the administration of justice in America are elaborately reviewed in an article in the American Law Review for March, April. The main points in which attention is required according to the writer for its improvement are (*i*) Proper training for the legal profession. He says that in many of the States, there is no preliminary training, or general qualification of any sort insisted upon for those who pursue the profession of law. (*ii*) Giving the bar greater influence in the selection so as to insure expert qualifications in the Judge. As it is, the elective principle has led to the appointing of persons who have no qualifications for the office. (3) Unification of the judicial system. The multiplicity of Courts and their independence of each other make the question of *venue* one scandalous cause of failure of justice. (4) Giving courts power of making rules of procedure (5). Improvement of legislative law making both in substance and technique. (6) Thorough study of the new problems which an industrial and urban society has raised.

As Mr. L. D. Mallonee says though custom has ceased to be a primary source of law in the western countries is still an important element of law— in so far as it affects legislation and forms a large element of the rules that determine daily conduct.

Discussing the maxim *res ipsa loquitur*, Professor Lee of Mc. Gill University says that it is not a rule of law nor even a presumption of law but only rule of commonsense an a inference from common experience. It has no connection with the doctrine of noxal surrender-holding a man liable irrespective of his mental

condition. It applies whenever it is so improbable that the accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that was so caused. (Canadian Law Times for April). In the Canadian Law Times for May, Sir James Aikins pleads for codification of the common law in Canada and he thinks that it is one of the duties of the Bar Association to see it done. Mr. Lafleur pleads for uniformity in laws in Canada, especially in commercial law, law of wills at least with respect to formalities, taxing statutes, and Processual Law.

BOOK REVIEW.

THE LAW OF TRANSFER IN BRITISH INDIA *by Dr. H. S. Gour, Vol. II.*

This is the second volume of Dr. Gour's well-known book on Transfer of Property Act, the first volume of which we have already reviewed. The subject dealt with is mortgages and charges, much about the most difficult portion of the property law in India and the profession is under deep obligation to Dr. Gour. It was a good idea not to have omitted the processual law connected with mortgages which is by no means the least difficult portion of this difficult subject. We do not feel called on to say more with respect to a book like Dr. Gour's which has already made its reputation as an indispensable item of every lawyer's library. This volume fully maintains the excellent features we noticed in the earlier volume.

MODEL PLEADINGS AND DEEDS *by Rai M. C. Sarkar Bahadur.*

We have no doubt that this publication will be found useful by beginners in the profession all over India though the Bengalee pleadings at the end can be appreciated only by the practitioners of that province.

THE INDIAN DECISIONS (OLD SERIES) VOLS. 9 and 10. *Edited by the Lawyer's Companion Office* :

We welcome the re-appearance of this valuable series. These volumes contain Vols. 2 and 5 of the Bengal Sudder Dewany Adalut Reports. In publishing them, the Editors laboured under the disadvantage of having to frame headnotes which are wanting in the Original Reports. Apart from the historical interest that attaches to these reports, they contain much that is valuable precedent even to day, especially on such topics, as customs, land tenure Religious Endowments, and Hindu and Mahomedan Law. Tara Muhnee Dasee's case which was the centre of so much controversy recently is reported in this volume. The profession is thankful to the publishers for bringing these rare publications within the reach of all. Law Printing House publications have acquired such a reputation that we need hardly commend the get up or the finish of these volumes.

THE CURRENT INDEX OF INDIAN CASES, 1914, PUBLISHED *by T. A. Venkasamy Rao and T. S. Krishnasamy Rao.*

We are glad to observe that this volume maintains to the full the reputation that this publication has acquired for fulness and neatness.

ADMINISTRATION OF CRIMINAL JUSTICE IN ANCIENT INDIA *by Mr. A. V. Ramanathan.*

We commend this study of Sukranitisara with reference to the Criminal Procedure obtaining in Ancient India. It is only by careful study of this kind of the ancient legal and—*quasi legal* legal works that reliable information as to Ancient Indian History can be gleaned. This study by the writer has reveaed the high perfection to which Criminal procedure had attained in Ancient India. The writer is not prepared to concede great antiquity to the work, a point on which there is legitimate scope for considerable difference of opinion.

The Madras Law Journal.

PART VII.] AUGUST 1915. [VOL. XXIX.

MAKING REVERSIONERS PARTIES TO MORTGAGE SUITS AGAINST HINDU WIDOWS.

In the course of the judgments in *Bhagirathi Das* v. *Baleshwar Bagarti* [1] and *Kutti Goundan* v. *Mahali Ammall* [2] there are some questions suggested and observations made in reference to the above subject which deserve more than a passing notice. The opinion expressed by the learned judges being such as manifestly to necessitate a multiplicity of suits and aggravate the uncertainty of titles derived from judicial sales, we hesitate to accept the same unreservedly ; and we venture to think that on principle there is much to be said against their view while of authority there is little in favour of it.

In connection with the question of the position and rights of reversioners, there is a well-established distinction between cases in which a mortgage has been made by the last male-holder and those in which it has been made by a female-holder entitled only to a limited estate. In the former, the mortgage is unquestionably binding on the inheritance (if it was valid against the mortgagor) whereas in the latter, the charge may be good as against the mortgagor but inoperative as against the inheritance. This difference in substantive law must needs have its parallel in processual law. In the first class of cases, it is now well-established that when the mortgagee sues for sale or foreclosure, the female-holder (or widow, to take a typical instance) sufficiently *represents* the inheritance and any decree passed against her and proceedings in execution thereof will (in the absence of fraud, collusion, *etc.*,) bind the reversioners. In the second class of cases, the proceedings in the mortgagee's suit will be effective to cut off the rights of the reversioners, if the mortgage has been executed for certain purposes recognised by the Hindu law *but not otherwise.* The validity of the mortgage executed by the widow and the extent of interest taken by the execution purchaser under a decree

1. (1913) I. L. R. 41 C. 69. 2. (1911) 22 M. L. J. 364.

based on such mortgage can be *finally* settled only in the presence of the *actual* reversioner, that is, after the widow's death. But it cannot be denied that it may often be very much to the advantage of the mortgagee to have the question *tried* during the widow's lifetime. It is on a similar ground that the law gives to the *presumptive* reversioner a right to impeach the validity of the mortgage by way of a declaratory suit; and the utility of the adjudication will be quite as much in the one case as in the other. It is therefore manifestly desirable that the mortgagee should be at liberty to have this question also tried during the widow's lifetime and preferably in the mortgage suit itself.

But the propriety of the mortgage is not a point arising between the widow and the mortgagee and it can be put in issue only by adding the presumptive reversioner. Is there anything in law to preclude this? This then is the *first* question. If the presumptive reversioner is to be added and the question of necessity or no necessity allowed to be raised, further questions arise. (ii) Is the presumptive reversioner, when brought before the court, *bound* to plead on the question of necessity or no necessity; and (iii) if either on account of the presumptive reversioner's *omission* so to plead or his failure to displace the plaintiff's case as to necessity, the court finds the mortgage to have been made for a proper purpose, what is the effect of such finding as against the *actual* reversioner?

The learned Judges of the Calcutta High Court, (in the case abovementioned) suggest the first question but do not decide it. With reference to the other two questions, they observe: "It does not follow that a reversionary heir when drawn into the litigation is not entitled to urge that as he cannot be called upon to redeem, he would prefer to be left alone with liberty to contest the title of the mortgagee or of the purchaser at the sale in execution of the mortgage decree, if he should ever succeed as the actual reversionary heir"; beyond this, the learned Judges express no definite opinion. But in judging of the soundness of the implication contained in the above extract, it must be borne in mind that if the presumptive reversioner chooses to come forward as plaintiff praying for a declaration of the invalidity of the mortgage, as against the reversioners the mortgagee is not allowed the option to say that as the reversioner is not then entitled to, nor bound to redeem (even if the

mortgage is shown to be good), he will wait till the reversion actually falls in and see who turns out to be the actual reversioner.

In the Madras case, Justice Sundara Aiyar, dealing with the first of the above questions, observed that the reversioner is not a 'necessary' party to the mortgagee's suit and added, "indeed it is doubtful whether he can be held to be a proper party at all." The learned judge was however prepared to hold that the reversioner had a sufficient interest in the property to entitle him to discharge the mortgage debt after decree so as to prevent the loss of the property to which he would be entitled to succeed after the death of the widow. He reconciles the two positions by drawing a distinction between cases in which the reversioner claims of his own accord to redeem (as one having 'an interest in the property' within the meaning of S. 91 of the Transfer of Property Act) and those in which he tries to save the property for the estate upon the mortgagee attempting to sell it. This distinction would itself go a great way to justify the mortgagee in making the reversioner a party *defendant* to a suit for foreclosure or sale; but the learned judge thinks that such a course is not warranted by the language of S. 85 of the Transfer of Property Act (now O. 34, r. 1, Civil Procedure Code) which only requires the addition of 'all persons having an interest in the property' (in the present rule, 'all persons having an interest either in the mortgage security or in the right of redemption'). He holds that the 'interest' referred to in S. 85 must be of the same kind as that recognised for the purposes of S. 91 (a), and as to S. 91 (a) he refers to the decision of the Allahabad High Court in *Ramchandar* v. *Kallu* [1] that the presumptive reversioner cannot claim to redeem.

With reference to the first of the questions stated above, it is submitted that there are good grounds for recognising the presumptive reversioner as a *proper* party to the suit. The view is also supported by the authority of Dr. Ghose who in this connection observes "Reasoning from analogy, a Hindu widow in this country is entitled to represent the estate in an action by the mortgagee upon a mortgage made by the husband. But where the mortgage is made by the widow herself, the reversioners ought to be added as parties if the mortgagee wants to bind the husband's estate" (Law of Mortgages, 4th Edn. Vol. I p. 588). The learned

1. (1908) I. L. R. 30 A. 497.

author does not however discuss the question at any length; and there being no direct authority on the point, it is desirable to examine the matter for a moment on principle and with reference to the practice in England and in India, before the Transfer of Property Act.

The principle of the rules as to the parties to be brought before the Court in any action is thus stated in Daniell's Chancery Practice :—"A person may be affected by the demands of the plaintiff in an action either immediately or consequentially. Where a person is in the actual enjoyment of the subject matter or has an interest in it either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claims, he has an immediate interest in resisting the demand and all persons who have such immediate interests are necessary parties to the action." (Ch. III S. 3). One of the applications of the above principle is that "wherever real estate is sought to be recovered or a right is sought to be established or a charge raised against real estate, it is necessary that the person or persons entitled to the inheritance should be before the court (*ibid*). Hence it is that in mortgage actions, when the person in possession is only a qualified owner, it is not always sufficient to make him alone a party. If he is a tenant for life, it is well established both in England and in America that the first person *in esse* who has a vested estate of inheritance should also be added as a defendant. If, on the other hand, he is a tenant in tail, it is enough to have him before the Court, for, as Lord Camden said (*Reynoldson* v. *Parkins* [1]) 'he sustains the interest of everybody.' Again, even if the person in possession be the present owner in fee, if his estate is precarious, as for instance subject to defeasance by way of conditional limitation, executory devise *etc.*, the inheritance is not represented by him but the persons claiming in contingency upon the defeat of the estate in fee should also be made parties (Daniell's Chancery Practice Ch. III, S. 3; Fisher on Mortgages S. 1654 *et seq*; Jones on Mortgages S. 1401; Ghose on Mortgages 4th Edn. p. 587).

It would thus be seen that the real test by which to determine the propriety of bringing a person before the Court is to see whether the plaintiff's claim threatens to destroy or diminish some interest of his (whether in possession or in expectancy)

1, (1769) Ambl. 564.

and if so, whether such interest is *represented* by a person already before the Court (or as is sometimes put, is it one that can be *defeated* by the person already on record). The statement that the holder of a subsequent interest need not be added, if his interest is only contingent is merely a part of the rule (and not the whole rule) and is apt to be misleading if taken by itself.

Bearing these principles in mind the rule, as stated by Dr. Ghose will be intelligible. Where the creditor is content to proceed against the widow's limited interest, the reversioners are not concerned at all, for in the words of the rule above quoted from Daniell, the plaintiff's demand does not affect the interests of the reversioners. Where the mortgagee seeks to bind the full estate, his suit (against the widow) : threatens the full estate (including the rights of the reversioners). But if the suit is on a mortgage executed by the last male holder, the reversioners are nevertheless not required to be made parties because, it has been the established rule since the *Shivaganga case* [1] that in such suits the widow sufficiently represents the inheritance. No such general right of representation is recognised in cases where the action is based on a cause of action personal to the widow or relates to a debt incurred by her. That in such cases, it is not only not improper but quite appropriate to bring the presumptive reversioner before the court is clear from the observations of the Judicial Committee in *Nagender chunder Ghose* v. *Kamini Dosse* [2]. Their Lordships first reaffirm the 'general rule' that in a suit brought by a third person the object of which is to recover or charge an estate of which a Hindu widow is proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. But where the interests of the widow and the reversioner are antagonistic; where the reversioner charges that the widow has been seeking to destroy the estate, they say it would be obviously inequitable for the creditor (in certain circumstances) "to seek its destruction by a sale of the whole estate under an ordinary execution, *without giving the reversioners the means of protecting their interests by making them parties to a suit the object of which*, by a mortgagee who advances to save the estate, *should properly be to have an additional charge declared in his favor on it subject to redemption* and in default only of redemption

1. (1863) 9 M. I. A. 539. 2. (1867) 11 M. I. A. 241.

seeking a sale" (the italics are ours). The addition of the presumptive reversioners as parties to a suit against the widow when the creditor seeks to bind the estate is distinctly contemplated in numerous cases [see for instance. *Brij Bhukun Lall* v. *Mahadeo Dobey* [1], *Mohuna Chunder* v. *Ram Kishore* [2], *Srinath Dass* v. *Haripada Mitter* [3] *Marudaga Nachiar* v. *Savadi Tirumalai Kolundu Pillai* [4].]

In *Srinath Dass* v. *Hari Padamitter* [3] Jenkins, J. (as he then was) after referring to the fact that under certain circumstances Courts have permitted the expectant reversioners to be represented by a Hindu widow, adds, "when and how this rule of practice was established is not clear". Adverting to the 'general rule' of representation by the widow, as affirmed by the Judicial Committee in Nagender Chunder's case, the learned Judge points out that the basis of the rule must be that 'the defendant on record, by reason of common interest, is as much concerned to resist the particular claim as those who are not parties and that it is but reasonable to suppose that she will fairly and honestly contest the right (suit ?) and uphold and maintain the several interests which are adverse to those of the plaintiff'. He then proceeds, "where there is a charge created by the ancestor from whom the widow and the reversioners alike derive their title, I can well understand that there is such identity of interest as will justify the widow being treated as the substantial representative of the inheritance, but is there any case which goes the length of deciding in favour of the sufficiency of her representation where she is the person who has created the charge ? I have searched the reports for such a case but without success * * * * If the matter be looked at on principle there is an obvious distinction... ....The distinction is one recognised by Lord Eldon (with reference to tenants in tail)." [See also the observations to a similar effect in *Brij Bhukun Lal* v. *Mahadeo Dobey* [1].]

As to the early practice in India, Sir Edward Hyde East writing in 1819, and speaking of remedies for debts *due by the husband himself*, mentions it as his belief that in bills for foreclosure *etc.*, it has been most usual to add the first male heir in remainder, but he adds that 'this may have been done in parti-

1. (1872) 17 W. R. 422.
2. (1875) 23 W. R. 174.
3. (1899) 3 C. W. N. 637.
4. (1910) I. L. R. 34 M. 188.

cular cases *pro-majori cautela'* (*Cossinath Bysack* v. *Hurro Soondary Dosse*[1], referred to by Jenkins, J.).

In a note of his to an earlier case *Gopey Mohan* v. *Seban Cower*[2] (referred to both by Dr. Ghose and by Jenkins, J). Sir Edward East suggests a distinction between suits for foreclosure and suits for sale, in the following observations :—It is her duty to pay off the mortgage debt as well as all other debts of her husband......and if she alone may sell, why may not she alone be sued. If the creditor had sued for the money lent, at law, and recovered judgment against her alone, he would have been entitled to take the lands in execution for the debt of the husband. Why then should it be necessary to sue different persons in equity for the same purpose, assuming that purpose to be for *sale* of the land for the payment of the debt? If, indeed, the purpose were for a foreclosure merely (which is to acquire an interest *ultra* the debt) the case might admit of a different consideration". As to the pratice in suits for sale, he states that a search for precedents was made but he 'did not derive any satisfaction from the result, the instances referred to being scanty and recent.' It may be noted in passing that the above remarks of Sir Edward East were made with reference to debts due by the husband and will not apply to claims in respect of debts incurred by the widow herself.

Is there anything in the Transfer of Property Act then, which indicates an intention to depart from the principles above discussed or otherwise renders it improper to add the presumptive reversioner as a party to a suit for sale or foreclosure when the mortgagee suing on a mortgage created by the widow herself seeks to bind the inheritance. Section 85 is not in terms limited to persons having a 'vested' interest; but Justice Sundara Ayyar imports the limitation from S. 91 (*a*) and the decision in *Ramchandar* v. *Kallu*[3].

(To be continued).

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1. (1819) 2 Morley's Digest 198 at p. 210. 3 Ind. Dec. O. S. at p. 916.
2. (1817) 2 Morleys Digest 105. 3 Ind. Dec. O. S. at p. 846.
3. (1908) I. L. R. 30 A. 497.

SUMMARY OF ENGLISH CASES.

Harris *v.* **Taylor**, (1915) 2. K. B. 580 C. A.

Foreign judgment—Enforceability—Voluntary submission to jurisdiction—What amounts to—Conditional appearance—Effect.

It is an entire misconception to say that there is a voluntary submission to the jurisdiction of a foreign court only when the defendant by appearing in the action in the technical sense has consented to the jurisdiction. If the defendant has applied for the exercise of the protection of the foreign court on his behalf, he has brought himself under an obligation to obey its ultimate judgment, and the same is therefore enforceable against him in England.

The action was to enforce a judgment obtained by the plaintiff against the defendant in an action in the Isle of Man for the recovery of damages for criminal conversation by the defendant with the plaintiff's wife. The question for decision was whether the defendant had so acted as to submit to the jurisdiction of the court of the Isle of Man and the judgment of that court was enforceable against him in England. The facts found were: The plaintiff was domiciled and resident in the Isle of Man: the defendant was resident in England and was not subject to the jurisdiction of the Isle of Man court. The plaintiff applied *exparte* for and obtained leave to issue a writ and to serve it on the defendant out of the jurisdiction. A writ was issued and was duly served on the defendant in England. The defendant's advocate subsequently appeared "conditionally" and applied to the court to have the service of the writ out of the jurisdiction set aside on various grounds. That application was heard and dismissed. The defendant took no further part in the proceedings and a decree was passed in favour of the plaintiff for damages and costs. *Held*, that the defendant submitted himself to the jurisdiction of the Isle of Man court and that its judgment could therefore be enforced against him in England.

Kenski *v.* **Peet.** (1915) 1 Ch. 530.

Restraint of trade—Master and servant—Agreement not to solicit customers—Too wide—Service terminable on a week's notice —Dispensed with on payment of a week's salary—Wrongful dismissal—Repudiation.

Where defendant entered the plaintiff's service on a weekly salary and subject to termination by a week's notice and the plaintiff dispensed with the services of the defendant by paying one week's salary in advance and not permitting her to work for the week, in the absence of an obligation to provide work for the week, the dismissal of the defendant was not wrongful.

Where the defendant agreed " not at any time during or after the determination of the employment directly or indirectly either on her own account or for any other person or for any firm or company to solicit, interfere with or endeavour to entice away from the master any customer of or any person or persons in the habit of dealing with the master," the form of the covenant is too wide, as it is unlimited in time and extends to all customers who either at the date of the contract or at the date of its determination or at any time thereafter may be customers or in the habit of dealing with the master. The extension of a covenant of this kind to customers at any future date is not reasonable. The covenant in the case not being severable is wholly bad.

Goldstein *v.* **Sanders.** (1915) 1 Ch. 549.

Landlord and tenant—Covenant not to assign without the consent of the lessor "such consent not to be unreasonably or vexatiously withheld"—Covenant running with the land—Agreement for underlease.

A covenant in the lease-deed, that the lessee is not to assign or demise without the consent of the lessor, " such consent not to be unreasonably or vexatiously withheld " is a covenant running with the land and binds the assigns and demisees of the lessee.

A person who agrees to take an assignment of the lease from the lessee of the property is bound by the covenant though no assignment of the lease is executed, in the same way as he would be bound if the assignment were executed.

Adams *v.* **Thrift.** (1915) 1 Ch. 557.

Company—Directors—Liability for misrepresentation—Reasonable ground to believe in the truth of statements—Reliance on the statements of a promoter—Companies' Consolidation Act, S. 84,—Allotment—Damages.

Where the directors of a Company issued a prospectus containing untrue statements and a person took shares relying on those statements, the directors to exonerate themselves from liability to those that took allotments of shares under S. 84 of the Companies' Consolidation Act, 1908, should prove that with respect to every untrue statement they had reasonable ground to believe and did up to the allotment of shares believe that the statement was true.

The uncorroborated statements of a vendor and promoter do not by themselves afford no reasonable ground for believing them to be true. The existence of a reasonable ground for belief in the truth of any statement is established by the proof of any facts or circumstances which would induce the belief in the mind of a reasonable man, that is to say, a man who stands between the careless and the easy-going man on the one hand and the over-cautious and skin-splitting man on the other. The measure of damages in such a case is not the difference between the amount paid and their present value; but the difference between the amount paid and the value of the shares at the date of the allotment.

In re **Groos. Groos** *v.* **Groos.** (1915) 1. Ch. 572.

Conflict of laws—Will—Law of Holland restricting testamentary capacity—Personalty—Subsequent acquisition of English domicil—Extended testamentary capacity—Effect on former will.

A testatrix being a Dutch subject domiciled in Holland, who by the law of Holland had power to dispose of only one-fourth of her property by will in the circumstances under which her will was executed, made a will in the Dutch language and according to the formalities of the law of Holland disposing of all the properties over which she had a disposing power by will, in favour of her husband. She subsequently acquired an English domicil and under English law she could dispose of her whole property by will. Under such circumstances, her testamentary capacity became extended and her husband was entitled to the whole of her property under the will.

Hatten v. Car Maintenance Company, Limited. 1915, 1 Ch. 621.

Lien—Motor Car—Agreement to maintain Car and supply Chauffeur and materials.

By an agreement between the owner of a car of the Motor Maintenance Company, the latter was well and sufficiently to maintain the car and supply petrol, &c., for the proper running and repair breakdowns and provide a driver who was to be the Company's servant; and the owner was to make some payments for the same, a fixed annual sum up to a certain mileage and at a certain rate for every mile above that. The owner took the car with her wherever she went out of London; while in London, it was in the Company's garage. A sum of money had became due under the agreement and the Company claimed a lien on the car for the amount.

The car having only been maintained in its former condition, the Company was not entitled to any lien on the car. A claim to a lien will only arise in the case of any improvements effected to the car. Even if the Company had a lien originally, that lien would be lost by virtue of the arrangement under which the owner was to be at liberty to take the car away and did take the car away as and when she pleased.

JOTTINGS AND CUTTINGS.

Reprisals and War-Crimes:—Reprisals in war, to which public interest has been of late much directed by discussion in Parliament and in the Press, are a means of compelling a belligerent to observe the laws of warfare whether on land or sea, and may in general be described as the sanction of the rules of war. It is sometimes loosely stated that international law is too weak to stand the strain of the violence of combatants. This is not so; for the sanction afforded by the due use of reprisals acts in a more direct and in a more immediate manner than does any protest against an international wrong made in times of peace. But the use of reprisals contains an obvious danger. It may so easily degenerate into a mere competition of barbarism that it has been hedged round with the most severe restrictions. And this makes it necessary to draw a distinction between reprisals in war and war-crimes. 'War crimes,' says Professor Oppenheim (2 Int. Law, p. 309), 'are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture

of the offenders.' Thus the essence of the war-crime is that it is an isolated and unauthorised act of certain members of the enemy's forces; the offender if caught is liable to be tried by court-martial and the penalty is generally death. Reprisals, however, are directed against acts of illegitimate warfare which have recieved the ratification, either expressed or implied, of the enemy authorities. If the subject of one State in time of peace commits an offence against the subjects of another, or against the other State itself, it is *prima facie* for his own Government to punish him. But in the case of a war-crime, the sanction acts directly; the criminal is dealt with by the military authorities of the injured State. Thus any person who abuses the white flag, or robs the wounded or prisoners, or in general commits any breach of the laws of war, is tried by court-martial and punished. But there is as yet no case for reprisals. That can only arise if and when it becomes clear that the acts complained of are part of a system authorised or acquiesced in by the enemy authorities. The war-crime is shifted from the individual to his Government, and the only way to deal with a Government which makes itself responsible for such methods of barbarism is by way of reprisals. The efforts of the Brussels Conference of 1874 (which produced an unratified convention) and of the Institute of the International Law to restrict the use of reprisals have met with little success; and in the absence of any sanctioning power to enforce the clear practice of civilised states, it is to be feared that the matter will be largely regulated by violence rather than by rule.—*Law Journal.*

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Authors and their manuscripts:—Among the curiosities of literature in its legal relations the recent settlement of the four years' litigation over Tolstoi's manuscripts and copy-rights will certainly take a high place. When the great humanist died it was a surprise to Russian society and the world that he had shortly before his death made a will, in regular legal form, leaving all his manuscripts and the copyright of all his works to his favourite daughter—the youngest—ignoring the claims of the countess, his widow, and his other children to participate in this most valuable property. Tolstoi had all his life been a determined opponent of copyright, and of all such devices for securing property in products of the brain, and here he was found to have consecrated his own legal rights by conferring them on one member of his family to the

exclusion of all the others—and to the exclusion, of course, of the public. The great preacher of peace, the denouncer of all litigation, had by his own act created one of the bitterest of family and legal conflicts, and his executors were forthwith involved in a fierce struggle for the upholding of the will in the interest of the favoured daughter, against the attacks of the widow and elder children. The Senate, the highest Russian tribunal, has now given its final decision against the will, and awarded the property in dispute to the author's widow; but this award is accompanied by the curious announcement that the Dowager Countess has at the same time made a free gift of the collection of manuscripts to the Moscow Museum, and has consented to the Academy at Petrograd publishing, without payment or royalty, a complete edition of Tolstoi's works. In this way a settlement is arrived at satisfying both public and family claims in a way which is quite characteristic of the author's country, where law and public policy are inextricably involved, and large views of 'morals' are constantly allowed to override considerations of legal right or justice. Under our own system, of course, such a result would have been impossible; due effect would naturally have been given to the will of the deceased author, who had full power to dispose of his manuscripts and copyrights in the same way as with any other part of his property. But there is, perhaps, in the result a sort of consistency with Tolstoi's own principles; for his devotion to things of the mind and soul made him all his life—and why not in death?—oblivious of all legal considerations.—*Ibid.*

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Effect of 'Guilty but Insane' on Successions:—Mr. Justice Joyce has applied to a case in the Chancery Division the decision of the House of Lords in *Rex* v. *Felstead* (1914)—one of the few cases in which a decision of the Court of Criminal appeal has been carried to the House of Lords. This can only be done by the special leave of the Attorney-General, given in view of the importance of the point. In the case before Mr. Justice Joyce (*In re* Houghton; May 9) the question arose whether or not a Criminal lunatic who had killed his father could benefit under the latter's intestacy. Houghton had killed his father and brother, had been tried for the crime after a coroner's jury's inquisition of murder, had been found 'guilty but insane' under section 2 of the Trial of Lunatics Act, 1883, and had been ordered to be detaine

during His Majesty's pleasure. Now, it is well settled law that a murderer cannot benefit from the death of his victim (*In re Crippen* [1911]) ; and it is equally well settled that the verdict of a Criminal Court will be accepted in a Civil Court as *prima facie* evidence of the crime. It follows, therefore, that if a verdict of 'guilty but insane' means one of 'guilty,' the prisoner is excluded from any participation in the estate of his victim. But in *Rex* v. *Felstead* the House of Lords overruled the view of the Court of Criminal Appeal that such a verdict is one of guilt (although it affirmed the decision below on other grounds), and declared that this special verdict is one of acquittal. The effect of this view is twofold : it prevents a prisoner from appealing against such a verdict—since there is no appeal against an acquittal; but it also—so Mr. Justice Joyce has just held—removed from him the taint of murdering his benefactor, and so permits him to take his share under the deceased's will or on his intestacy.—*Law Journal, May 15th.*

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Somnambulism as a defence :—It is often easy to see that a certain line of defence must in common sense be open to the prisoner, and yet puzzling for counsel and judge to discover the precise legal category under which the plea is admissible. An example is afforded by the successful appeal of J. E. H. Zimmerman, which came before Mr. Wallace at London Quarter Sessions last week. Zimmerman (the well-known tennis player) is a British-born subject, the son of a German who was naturalised so long ago as 1870. He was convicted and sentenced to six months' imprisonment in the second division at Westminster Police Court for trespassing on the Brighton Railway line at Grosvenor Road, a place forbidden under the defence of the Realm Act ; nothing else of a suspicious nature was alleged against him. His defence was that he and three of his brothers and sisters are addicted to sleep-walking, that they keep bells outside their bedroom doors to wake them if they attempt to walk out in their sleep, and that he had been the victim of a fit of somnambulism on the night of the offence. His defence was supported by Medical evidence of a Harley Street specialist, and was accepted by the Court of Quarter Sessions, which quashed the conviction. Now, in what way does somnambulism excuse the commission of acts which, if committed by a person who is

awake, would undoubtedly be criminal? It cannot be said to be a form of 'insanity'. The answer is supplied by the late Sir James Fitz James Stephen in his 'General view of the Criminal Law of England' (Ed. 1863, pp. 78-81). He there points out that, wherever deliberate intent is an essential ingredient of a crime, the action consists of a series of stages, namely, (1) occurrence to the mind of the contemplated action as a possibility, (2) deliberation, (3) resolution, (4) intention, (5) will, and (6) execution by 'a set of bodily motions co-ordinated towards the object intended'. Now psychologists, in criticising this passage, have taken exception to this description of the mental process of action (cf. Arnold's 'Psychology in relation to Legal Evidence' at p. 121) but in substance it may be accepted as good for all practical purposes. Now, as Stephen points out, both (4) 'intention' and (5) 'will' must be present in order to constitute a 'criminal intent'. They are different things, and 'will' may be present without having been preceded by 'intention'. 'Secondly', he says, 'will may exist without intention..............the case is illustrated by the motion of an infant: a new-born child moves its hands and arms and lays hold of anything between its fingers.............. these motions are voluntary..............probably somnambulism and other movements during sleep are of the same kind......... they are voluntary, but as they are not co-ordinated with a view to any definite result, they are not accompanied by any intention'. Hence it is that 'somnambulism', since it precludes the existence of 'intention', one of the essential ingredients of 'criminal intent', is a valid defence; but in view of the clause the onus of proof is, of course, on the accused.—*Law Journal.*

Public Policy and the Press:—In dealing with the law relating to trustees, Lord Lindley once said: 'It is the function of a trustee to commit judicious breaches of trust'. So in the remarkable journalistic case before the Court of Appeal last week (*Neville* v. *The Dominion of Canada News Co.)* Lord Justice Pickford, while expressing his agreement with the view that a newspaper has no more duty to say defamatory things than a private individual, added: 'but it is not clear that the same considerations apply to a newspaper carrying on the business of advising investors'. While the learned Lord Justice shrank from laying down affirmatively that there is any duty even on such a newspaper to defame, he was emphatic in his endorsement of the view expressed by Mr. Justice Atkin,

whose judgment was under appeal, that 'for a newspaper to stipulate for a consideration that it will refrain from commenting upon fraudulent schemes, when it is the ordinary business of the company to comment on fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a court of law.' This is an extension of the doctrine of 'public policy' which it is important to note. According to Anson (' Principles of the law of Contract,' 13th Edn, p. 232) one of the main heads of the cases to which the doctrine applies is 'agreements to do that which it is the policy of the law to prevent'. We must now add to this 'agreements to refrain from doing that which it is the policy of the law (or of the State) to encourage.' For the freedom of the Press, though it has been described as a 'limited freedom'—that is, it is free, subject to the law of libel—is certainly an object of public interest, and it is the policy of the State to preserve it. In the case under consideration the proprietors of the newspaper had agreed for an advance of money not to comment on a land company of which the plaintiff was a director, or on any of its capital investments, with a provision that a certain proportion of the advances was not to be called in so long as the agreement was observed. It was because of alleged breaches of this honourable understanding that the plaintiff now claimed repayment of his advances, but Mr. Justice Atkin held, and the Court of Appeal confirmed his view, that, the agreement being invalid, there had in law been no breach of contract by the defendants and the events had not happened upon which the advances became repayable under the agreement. In this indirect way the superior claims of a free press over freedom of contract were established, and the interest of the public in the preservation of the journalistic 'right to defame'—in proper cases, of course—was triumphantly vindicated.—*Law Journal*, *17th July 1915.*

CONTEMPORARY LEGAL LITERATURE.

The Journal of Comparative Legislation for July opens with appreciations of that great Judge and International lawyer Sir William Kennedy by Lord Justice Phillimore and Sir Courtney Ilbert. "He was a successful lawyer and an eminent Judge" says Sir Courtney Ilbert " but he was much more than either of these. His interest in law was not merely professional but genuinely scientific. He always sought and never wearied of seeking the

never despaired of finding the immutable and fundamental principles of law which underlie differences of creed, race, history and country." In his latest contribution to this journal, that was in July last, he was trying to estimate the drift of sentiment in the civilised world in regard to peace and war and thought that "enough has happened, small though it be, to encourage all right minded persons in all countries to work on for the world's peace with quiet practical endeavour and as men not without hope." The subjects in which he was generally found taking interest were questions of maritime law or broad issues in connection with peace and war. As to the latter, he took what was considered a retrograde view *i. e.*, to say he was opposed to the view that war was a matter between soldiers only; it was an affair between nations and in the long run it was more humane that it should be so. So that both on the question of the right of capture of enemy's property and the effect of war on contracts, he preferred the English view.

Mr. Ronald F. Roxburgh considers the legal position of the Declaration of London. He points out that it was intended to be a treaty, but has no binding force as it remains unratified by the high contracting parties. Though the "declaration" purports to lay down only rules substantially in conformity with the law of nations, in fact it is a work of compromise and mutual concession. Art. 65 of the declaration specially provides that the declaration must be treated as a whole. It was expected that the rules therein declared would become by consent which is after all the basis of international law recognised rules of law. For instance, during the Turko-Italian War, the belligerents adhered to its stipulations. The belligerents in the present war have departed for one reason and for another, largely from its provisions. There is in fact a fear that at the end of the war, it might remain "a monument of not what the law is but of what the law is not."

Mr. Norman Bentwich advocates the extension of "the Hague Conventions Private International Law" to non-Christian countries." It would be among the great benefits of such an extension that it would secure for members of non-Christian communities living in Europe some reciprocity of treatment with the privileges which members of European countries enjoy in non-Christian countries. The existing absence of that reciprocity is one of the blots on the jurisprudence of the European Imperial Nations, a point in which

it is notably inferior to the Roman System which recognised the perfect autonomy of every community in matters of personal law.

Naturalisation is the process by which one who is the subject of one state becomes by reason of acquisition of territory or otherwise, the subject of another while expatriation is the reverse process by which one who is a subject ceases to be so by reason of cession of territory. According to the theory of the English law, in the absence of any provision in the treaty by which the acquisition or cession takes places, all the subjects of the old sovereign attached to the acquired or ceded territory become the subjects of the new sovereign. If the subject has any option at all, that option must be exercised either simultaneously with or before the change of sovereignty. This forms the subject of an informing article in the Journal by Mr. F. B. Edwards.

Mr. James Edward Hogge discusses the relation of adverse possession to registration of title and suggests a uniform legislation on the matter. As it is, there are three different systems in the British Empire. According to one, the right to acquire title by adverse possession notwithstanding registration is preserved; in the second, it is expressly taken away and in the third there is no express provision dealing with the matter.

Mr. R. G. Marsden discusses the sources and the growth of *Prize law.* It has been made almost wholly by the Crown in the exercise of its prerogative which does not seem to have been materially affected by disuse or lapse of time or by the legislature. The High Court of Admiralty grew out of and early in the 15th century superseded local Courts held by the admirals. The exclusive jurisdiction of the Admiralty Court to decide questions of *Prize* has been unquestioned since. An appeal lay to the King until it was transferred to the Judicial Committee. In the beginning the Judge was considered a nominee of the Lord High Admiral to do his bidding but during the course of the 17th and 18th centuries, such interference became less and less marked and the practice came into vogue of consulting the Judge on the propriety of individual acts. This also ceased from the time of Lord Stowell. The decision has to be by reference to the law of nations but the King has still power to make rules by orders in Council to meet new conditions. The subject can have no interest in the prize except in so far as the claim is based on a grant from the Crown.

Mr. C. E. A. Bedwell recommends the formation of our Imperial Legislative Reference Bureau after the manner of similar Bureaus in America. Major Tremearne points out some of the difficulties that arise in British West Africa by the clash of the premitive customs of the native and the complex procedure of the West. The late Dr. Blyden, a native was so impressed by these difficulties that he recommended the adoption of the Mahomedan Law instead.

Mr. Samuel Rosenbarum describes the adaptation of the English system of rule-making in the otherparts of the Empire and the modification that the system had undergone in the process.

Air warfare is one of recent introduction and of necessity, the rules of such warfare are only in the making and have to be fashioned on the analogy of the rules of naval and military warfare. Mr. Piccio endeavours to indicate the lines on which he law is likely to settle itself.

The cases of the *Niewe Vriendschap* decided in 1783, and *Minerva* decided in 1807 must, according to Mr. J. E. G. Duemontmorceny govern those of the type of Dacia. According to those rulings, nothing short of the clearest proof that the transfer of the ship was *bona fide* and not intended to evade capture would suffice to prevent condemnation.

The views of Franciscus Victoria (1480-1546), the great Salamanca jurist whose life is dealt with in this issue of the Journal of Comparative Legislation are remarkably in advance of his age, for the toleration that he exhibits for the non-Christian communities which according to him as much as Christian communities are units in international life to be dealt with on the basis of the same international law. He repudiated the pretensions of the Pope as well as those of the Emperor to Empire over the Indians. He was equally against any claims to forcible conversions of infidels. He condemns is the practice of reprisals, when adopted irregularly and indiscriminately. In his "De Jure Belli" he denounces those who are ever ready to seek causes and occasions for war; he says that it is illegitimate to declare it without just grounds that when begun it must be prosecuted with strict moderation, that a clear distinction is to be made between combatants and non-combatants and that all belligerent operations should be carried out only to the extent demanded by the imperious necessity of self-defence and general security. By his cogent and scientific

presentation of these and other questions, he shows himself to be an invaluable precussor of Grotius, and an able builder of international law.

An interesting attempt is made in America to maintain peace and harmony in poor homes by the institution of a special court of domestic relations and a probation department to act in connection with it which prevents summons from issuing in desertion cases without the cases being thoroughly examined by the latter and steps taken to restore harmony where possible or at least procure amicable settlement between parties, It is intended similarly to have juvenile courts, etc., with homes to commit the offenders. Night Courts are another institution peculiar to New York and Philadelphia. Women take part in all these institutions with great resulting benefit for the best class of women would rather suffer great misery than complain to men or come into open Court.

The subject of contraband has just at present acquired great importance. Mr. Phillimore gives a list of the articles which are contraband according to the various belligrents in this war and points out the extent to which these lists deviate from the declaration of London. The principle of retaliation for which there is precedent in past wars, has added considerably to the list of contraband. England has refused to accept the proposed *modus vivendi* of the United States of America to superintend through licensed vendees the destination of food stuffs to civilian population.

In the *Juridical Review* for May, Mr. J.W. Brodie Innes points out the difference between the history of the English and the Scotch Law in respect of the *origins* of Courts. While the English High Court has grown up, by a natural and inevitable process of development, from the very first primeval type whereby disputes were settled among the nomad tribes wandering over the great central plains of Europe, while the inferior or country Courts are the modern creation of statute, in Scotland, the reverse has been the case. The Court of Session practically almost as it exists to-day was created by James V in 1533 but the inferior and local courts have grown, through many stages of development, to their present condition. Scotland was largely indebted for the idea as well as nomenclature of her courts to France. Difference in the origin of the courts led also to a difference in the substantive law; the Digest and the Canon law being authority in Scotland in case of

doubt while both these were anathema in England. The humble clerk who sat at the table of the Lord Chief Justice who was in charge of the records and was expected to keep the judges properly informed about precedents and by slow process was himself raised to a seat among the judges under the name of the Master of the Rolls now occupying an important place among the Judges as the President of the Court of Appeal has his analogue in the Scotch system in the Lord Clerk Justice who however never attained to the dignity of the Master of the Rolls. The writer describes graphically the convenient fictions by which the various courts in England acquired concurrent jurisdiction in all matters. If the plaintiff desired to bring his case before the Exchequer, he would state upon his writ (1) that the defendant owed him money, (2) that he owed money to the King, (3) that by reason of the defendant's not paying him he was the less able to discharge his debt to the King. No proof was asked of these statements. Because the payment of the King's Taxes was in question, the matter became an Exchequer matter. This fiction was called the Writ of Quo Minus. Similarly, if it was intended to bring the case before the King's Bench which had mainly to do with criminal work, one had only to allege that the defendant had punched his head when the debt was demanded. The Scotch Court never went through this process of development. The sheriff's courts in Scotland have a longer history and a more varied jurisdiction than the County Courts in England."

Mr. James Hogg, who has contributed an article on an analogous subject to the Journal of Comparative Legislation pleads for legislation on Registration of title enacting clear provisions as to the effect of registration on adverse possession, equitable estates, &c. which may lead to considerable reduction in litigation.

In the course of the administration of a trust, the trustee incurs a liability on a contract or in tort or otherwise to one other than the *cestui que trust*. What are the rights and remedies, legal and equitable of the person to whom the liability is thus incurred? This question is elaborately dealt with in an article in the *Harvard Law Review* for June, by Mr. Austin V. Scott. In the absence of an express stipulation relieving him from liability (even about the effect of this, there is some difference of opinion), the trustee is personally liable on contracts made by him whether he was acting with authority or without. Similarly

he is personally liable for torts committed by himself or by his agent. Except where the debt was properly incurred and is expressly entered on behalf of the trust in which case an action in equity is permitted against the trust estate; the only way the trust estate can be made liable is throughthe trustee's right of indemnity. The trustee has got the right to be reimbursed after payment; he has similarly the right in advance to be relieved from the liability. His general creditors also can proceed against his former right while only the particular creditor in respect of whose liability, there is this right of exoneration can avail himself of it to reach the trust estate. In most jurisdictions, such a suit will not lie when the trustee has other available assets. At common law, even if a person contracts as executor, the decree can only be against him personally. This right of exoneration or indemnity is held generally not to be available when the general account is against the trustee, though in some jurisdictions it is held that the creditor is entitled to proceed against the trust estate if in respect of his debt, the trustee has the right of indemnity. The trustee as such is not an agent of the *cestui que trust* and the *cestui que trust* cannot be made liable on that footing. If the trustee has given a charge or pledge, then the right of the creditor is to be determined by reference to the propriety of that transaction and need not be tested by reference to his right of indemnity. Where the trustee carries on business unauthorisedly, he has no right of reimbursement but where he has done so in good faith, and there has been an enrichment of the estate, to that extent his a right to exoneration is recognised.

Discussing the maxim—No presumption upon a presumption the writer of a note in the Harvard Law Review thinks that like numerous other impressive legal phrases which serve but to obscure the maxim may profitably be disregarded. In all cases of circumstantial evidence, the ultimate conclusion from the facts is arrived at through a series of inferences. It is only when the evidence is insufficient to support the verdict that this maxim is relied upon. It is only a statement of the truism that an inference ought not to be merely conjectural.

In the Canadian Law Times Mr. Silas Edward tracing the evolution of parliamentary Government in England the process by which the present Cabinet system with a constitutional sovereign acting

on the advice of his ministers has come to govern the country and the way in which the system was purged of the various abuses that crept in seems to be hard on his own country. "Bribery" he says "not only among the lectorate but graft on the part of those entrusted with the sacred duty of directing the affairs of the State, is the crying evil of the day and that too, in our very midst, permeating and corrupting all classes from the highest to be lowest ......If unchecked this cankerous growth will surely sap the vitality of the body politic of our fair dominion." The drooping hearts among the Indian political workers may take cheer from charges like these.

The *Central Law Journal*, (April 9), has an interesting study on the legal notions of Mark Twain. His father and grandfather were lawyers and his brother also was a lawyer and Mark Twain himself knew law. He in fact makes few slips in his works. Possibly it was the indifferent success of his father and the failures of his brother that turned Mark Twain away from law and made him indulge in gibes at lawyers. No other writer has turned so much to the environment of the law to find material with which to embellish a joke or point a moral. He was never-done praising the jury system of course, satiriscally as the "pallidium of our liberties" and hea ssured an English audience that its efficiency was only marred by the difficulty in finding twelve men every day who do not know anything and cannot read." "Extraordinary Twins" is an extravagant tale based on a trial in which the court is busy endeavouring to solve which half of the Twin body was responsible for an assault Twain has made use of the dramatic interest of murder trials in several of his works. But his *Joan of Arc* which according to his own estimate and according to the estimate of many of his critics is his best work, is a series of trials in which the subject is dealt with in all seriousness. Thus sums up the writer of this article, a conclusion highly interesting to the legal profession "his whole work from *Joan of Arc* to Tom Sawyer proclaims that he rests his fame more than any other writer of his time, upon what he knew of law and lawyers." In the issue of May '15, we have a dicsussion as to whether a murderer could take under a will or by inheritance from the murdered. There seems to be some difference of opinion in the American Courts as to whether the principle *Nullus Commodiem Capere potest de injuria sua'*—No one shall profit by his own wrong—can overid

statutory declarations as to the effect of wills or rules of devolution. The writer thinks that there is no conflict between the two. In some cases in America, the argument is advanced that this rule cannot stand in the face of the abrogation of the law as to corruption of blood and forfeiture by reason of felony or treason.

BOOK REVIEW.

THE SPECIFIC RELIEF ACT, *(Lawyers' Companion Series). 1915.* This book published at the Law Printing House gives under appropriate headings the case law that has grown under each of the sections and will be useful as a book of reference both to the Lawyers and Judges who want to get a collection of all the cases on point within the shortest time without having to run through several volumes of the Digests. The case law on the Act has been brought up to the end of 1914. The index to the book as is characteristic of Sanjiva Rau's publications, gives direct reference to the particular passages in the pages where it is found. The publishers have spared no pains in bringing out this revised edition of the Lawyer's Companion Series on the Specific Relief Act.

THE INDIAN EASEMENTS ACT—*(Lawyers' Companion Series). 1915 Edition.* This Edition of the Indian Easements Act has made a wholesome departure from its predecessor in incorporating largely references to English treatises and decisions. Consistently with the object of the publishers, there is no discussion of cases or principles. To add to the utility of the book, an appendix has been annexed where the law both English and Indian regarding each well-known class of Easements has been collected together giving the reader an idea of each of the classes of Easements apart from the mode of treatment in the Act. The appendix will be particularly useful to the practitioners and Judges in provinces to which Indian Easements Act has not been extended.

THE PRESIDENCY TOWNS INSOLVENCY ACT. *(Lawyers' Companion Series) 1915 Edition.*

We welcome this edition of the Presidency Towns Insolvency Act. The Act itself is a very recent one and the notes to the preamble give a clear idea of the object of the Act, the prior legislation on the subject, and the improvements effected by the Act on the pre-existing law. By this volume the publishers have placed within easy reach of the legal profession, the decisions in England on the subject which will have to guide largely the courts in the working of the Act. As appendices to the book are given the English Bankruptcy Acts of 1883, and 1890 and the Rules framed by the various High Courts under the Act. The case law has been brought thoroughly up to date by a supplement which gives the most recent decisions.

THE INDIAN DECISIONS (OLD SERIES), VOL. II. SUDDER DEWANNY ADAWLUT REPORTS, BENGAL. VOLUMES VI & VII.—*Law Printing House, Madras.*

We congratulate the publishers for the expeditiousness with which they bring out these volumes. The legal profession in this country is under great obligation to them for republishing these rare collections of cases.

SANJIVA RAO'S *All India Civil Court Manual: Local Acts (Madras).*

The profession was badly in need of an up to-date collection of the local Acts, the Madras Code being long out of date and is, therefore, sure to welcome this well-timed publication. Needless to say that it exhibits all the neatness and finish which we have learnt to associate with Lawyer's Companion Office publications.

PROBATE & ADMINISTRATION ACT *by Alexander Kinney, 2nd Edition. Published by Thacker, Spink & Co.*

As a handy book of reference, we trust this book will be found useful by the profession; the utility of the book is considerably enhanced by the improvements carried out in this edition. The

notes under each section are fairly full and accurate references to the appropriate pages of leading Text books will be found specially useful. A complete list of regulations that dealt with inheritance and wills before the act is given at the beginning which will be helpful in the critical study of early Indian decisions.

LAW OF SPECIFIC RELIEF, *by T. R. Desai : 3rd Edition.*

The number of editions that the book has gone through must be at least some index to its popularity. As an analytical commentary, it is likely to be appreciated by students for whose benefit the book is mainly intended. The notes cover all points which require elucidation ; the references are discriminating and will be found useful not only by the student but also by the practitioner. The get up leaves very little to be desired.

INDIAN ARMS ACT *by F. C. Widge.*

We in this part of India have very little to do with arms but from that it does not follow that we need not be acquainted with the Arms Act. It is easy for people all unwittingly to come within some section of Act—with very serious consequences. Even then, we did not suspect that there was material for 300 pages. But Mr. F. C. Widge's book shows that there is so much to know if one wants to know all about the Arms Act.

16-6-17

The Madras Law Journal.

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SUBROGATION AND SPECIFIC PERFORMANCE.

There is a tendency in some recent cases to confuse subrogation and specific performance and to treat rules applicable to one as equally applicable to the other. The operation of the doctrine of subrogation is supposed to be limited by the section of the Transfer of Property Act which declares that by force of a mere contract to sell no interest in the property is created.

In one respect there is a close resemblance between specific performance, and subrogation and that is that according to both as understood by English lawyers some act which ought to have been done or might have been done is deemed to have been done. The person who can claim specific performance may also claim in spite of the absence of a conveyance to be owner of the property contracted to be sold. The person claiming by subrogation may claim to be invested with a right which has not in fact been transferred to him. But there the resemblance ceases. In the one case a contract is necessarily presupposed; in the other there may or not be a contract. The English text-books do not, as far as I have discovered, treat of subrogation in anything like an exhaustive fashion. It has no article to itself in such a work as Lord Halsbury's Laws of England. There is some excuse therefore for having recourse to foreign literature—and there are at least two text-books on the subject by American lawyers. Subrogation is by them distinguished as contractual and jural. When a person interested in property pays off a mortgage on that property he may bargain with the mortgagee for the transfer to himself of the interest in the mortgage. That would be a case of contractual subrogation. It may be doubted however, whether the contract could be described as a contract to sell immoveable property. The mortgagee who is paid off has no interest to sell, and it cannot matter to him whether he reconveys the property to the person paying the money or transfers to him

his interest as mortgagee. It is by no means clear that a contract to make such transfer can properly be held to be affected by S. 54 of the Transfer of Property Act. But in the ordinary case when a claim by subrogation is made there is no pretence of a contract between the person so claiming and the holder of the mortgage in respect of which the claim is made. Subrogation of the jural type is that which is recognised in several sections of the Transfer of Property Act and which generally comes before the courts. There is nothing in that Act to limit or exclude the doctrine as recognised and illustrated by the English authorities. To hold that by force of a contract and without any conveyance or even without any contract a person may claim a mortgagee's interest in property, whereas in virtue of a contract to sell he could claim no interest, may be an anomalous state of things. But apparently it is the law in India. The proposition that an interest in immoveable property cannot be passed from one living person to another save by an instrument of transfer duly registered is not universally true.

H. H. SHEPHARD.

THE LAW OF APPORTIONMENT.

No rule is more characteristic of English Common Law than that which withholds from the Courts, in dealing with matters which form the subject of a contract, any power to adjust the relations of the parties to new circumstances which may have arisen. When a man puts goods on board a ship for their carriage to a certain port and the ship breaks down after performing half the voyage, the Common Law does not allow the court to award to the ship-owners half or any portion of the agreed freight. That freight has not been earned and there was no agreement to pay any other sum. It is not the business of the court to fabricate a new agreement for the parties. When a tenant for life lets the property for a year at a certain rent and dies shortly before the year is out and before the rent is due, the Common Law does not consider what part of the rent ought in justice to be paid to the representative of the deceased person. The rent had not become due and therefore at Common law nothing was payable.

In India as in England this common law way of looking at things has by statute been modified to a certain extent. The Contract Act has done something by providing for cases like that above mentioned of a ship reaching a half-way port but unable to go any further. The Transfer of Property Act in S. 36 has done something by providing for the apportionment of rent and other such dues as between the person originally entitled and his transferee. But this section being carefully restricted to the case of a transfer by the person entitled and to the relation between him and the transferee covers much less ground than does the English statute on which it is founded. The words of the section are so plain that a comparison between it and the sections of the Apportionment Act, 1870, is hardly necessary. But it may be interesting to mention that the commissioners in the original draft bill, having the statute before them, evidently intended a modification of the Common law rule at least as large as that which is furnished by the statute. The clause corresponding to S. 36, is framed in the most general terms, no reference being made to the case of transfer. It is simply an assertion that rents like interest on a debt shall be deemed to fall due from day to day and to be apportionable accordingly.

The Courts in India have expressed no doubt as to the construction of S. 36, and generally have held that the principle of

apportionment can be applied only to the cases within the section, the distinction between interest and dividends being in other cases preserved. But in two cases Madras Judges have taken a different line and have extended the principle to cases which are not within the section though they may be within the statute. In one case *Lakshmi Narayanappa* v. *Malloth Raman Nair* [1], Sir S. Subramania Iyer applied the doctrine to the case (heard by S. Subramania Iyer and Davies, JJ.,) of a tenant for life dying before the rent became due. In a recent case *Randipurazil* v. *Molloli* [2], where rent was claimed against the purchaser of property who had bought between two rent days the doctrine was applied in his favour and it was held he was liable not for the whole rent but only for an apportioned part. Of the two decisions this is the more striking for here there was a transfer but it was a transfer of the property subject to the rent, not a transfer of the right to receive the rent. Moreover, the question did not arise between the transferor and transferee. It is only after some discussion that it has been allowed that such a case would come even within the English Statute. These decisions are noteworthy because they assume that it is competent to the Courts in a matter for which the legislature has in part provided to supplement the legislation by appeals to equity. That the English Courts would not venture to act on this assumption is pretty clear from consideration of the cases on the Apportionment Act and it is difficult to see how the proceeding can be any more justifiable in India. The only justification that suggests itself would be that the Common Law rule has never been in force in India and that therefore S. 36 may be regarded as superfluous and anyhow not an exhaustive statement of the law. It would require some audacity to raise this contention, for it would mean that the distinction between interest on a debt and rents or dividends had been ignored by the Courts in India. It would mean that such interest and dividends had alike been treated, independently of Statutory Law, as apportionable. The argument too would ignore the inference which may fairly be drawn from the legislation of 1882, for the section itself being obviously suggested by the English Statute is evidence that the legislature considered the antecedent state of law to be the same in both countries. Why the legislature did not adopt the clause originally framed

1. (1902) I.L.R. 26 M. 510. 2. (1912) I.L.R. 38 M. 86=23 M L.J. 695.

and so modify the law to the same extent as in England it would be unprofitable to speculate. Possibly, it was thought that in an enactment relating to the transfer of property *inter vivos* the rule dealing with apportionment ought to be confined to the case of such transfers. However that may be, however unsatisfactory and inadequate the section may be, the supplementing of it would seem to be a matter for the legislature rather than for Judges.

In the second of the two cases cited it may be noted that after the fashion so common now in Indian Courts reference was made to American authorities. In a limited class of cases notably in those in which the physical conditions resemble those prevailing in the States rather than those in England, the citation of American Judgments of certain courts may be useful. But in the particular case there was no need to seek help from such a quarter. The justice of apportionment as applied to rents is authoritatively admitted by the English Law. At the best and on the assumption that there has been no legislation on the subject, American cases could only indicate what the law might have been in England or in India in the absence of legislation.

H. H. SHEPHARD.

SUMMARY OF ENGLISH CASES.

Adams *v.* **Thrift.** 1915 2 Ch. 21 (C. A.)

Company—Directors, liability of—Mis-statements in prospectus—Allotment of shares—Good faith—Uncorroborated statements of a promoter—Companies' Consolidation Act, 1908, S. 84.

Under S. 84, Companies' Consolidation Act a director of a Company at the time of the issue of the prospectus is liable for mis-statements in the prospectus, *inter alia* he had reasonable ground to believe and did up to the allotment of shares believe the statement was true.

A shareholder brought an action to recover compensation from the directors for misrepresentations in the prospectus on the faith of which, he had taken shares.

Held, the uncorroborated statements of a promoter ought not to be relied on by the intending directors as justification for their reasonable ground for belief; and consequently they were liable to the shareholder.

Herbert Morris, Limited, v. **Saxelby** 1915 2 Ch. 57 (C.A.)

Restraint of trade—Special branch of business—Employer and servant—Interests of servant and public to be considered.

Sargant, J. In determining the question of the reasonableness of a restrictive covenant between an employer and an employee, the interests of the employer are not the only elements to be considered. The Court should have also regard to the effect of the covenant on the employee, and on the damage to the public by its being deprived of his peculiar skill in the special branch of business.

The Court of appeal (Lord Cozens Hardy, M. R., and Joyce, J., Phillimore, L.J., dissenting) affirmed the decision of Sargant, J., and held that such a covenant ought not to be enforced.

In re **Houghten** *v.* **Houghten** (1915) 2 Ch. 173.

Intestacy—Son murdering intestate—Lunacy—Indictment for murder not proceeded with—Right to share in father's estate.

Where a person killed both his father and brother, and on the indictment for murder of his brother, it was found that he was insane when he committed the act, and consequent on this finding, the indictment for the murder of his father was not proceeded with, on a summons by the widow of the deceased father, whether the son, as one of the statutary next-of-kin was entitled to his share.

Held, it is not a necessary condition of the disqualifying rule that a murderer ought not to derive any benefit under the will of the deceased, that there should be a conviction for the offence.

Semble: The distribution of the property of an intestate being regulated by the positive provisions of statute law, a murderer can take a distributive share under the intestacy of his victim.

[*Cf. Vedanayaga Mudaliar* v. *Vedammal* 1.]

British Murac Syndicate, Limited, *v.* **Alperton Rubber Company, Limited,** (1915) 2 Ch. 186.

Company—Contract with a shareholder that he should have power to nominate a director—Article of association to that effect

1. I. L. R. 27 Mad. p. 591,

—Company's power to alter—Specific performance—Companies Consolidation Act, S. 13.

A company cannot alter its articles of association, if it would amount to a breach of contract.

Although the regulations contained in a company's articles of association are revocable by a special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles. In such a case the company cannot after the article or articles, as it would be a breach of contrac t.

A contract under which the plaintiff shareholder is to have the right of appointing two directors to the defendant company is not in the nature of a contract of service by which one person is compelled to accept another as servant; and the contract is specifically enforceable, the award of damages being a wholly inadequate and illusory remedy.

Thompson *v.* **Bradford Corporation and Tinslay,** 1915, III K. B. 13.

Highway—Corporation—Widening street—Post Office—Removal of telegraph Pole—Hole caused by removal—Improperly filled in—Negligence—Liability of Highway authority and Post Office.

Where a highway was widened by the local authority and on its request the postal authorities renewed a telegraph post standing on the road, and in filling up the hole did it so negligently—that the Plaintiff's steam wagon sank into the hole and was damaged, *held,* that the defendant corporation was liable as the duty was to so make it that it should reasonably be safe for the purposes for which it was intended to be used and the Post Office authorities also were liable on the ground that as having done a piece of work they did it negligently.

Per Bailhache, J.: "If a person does a piece of work negligently although he need not have done it at all, he is liable for the consequences of his negligence.

Huth *v* **Huth,** 1915 III K. B. 32 (C. A.)

Libel—Publication—Communication posted in unclosed envelope.

The defendant sent through the post in an unclosed and ungummed envelope a written communication which the plaintiffs

alleged, was defamatory of them ; *held,* in an action for libel, that there was no evidence of publication and the action would not lie even though there was evidence in the case that the plaintiff's servant abstracted the letter and read the contents thereof and in breach of his duty out of curiosity.

"If a person in breach of his duty were to open a letter and there was no reason to expect that he would commit that breach of duty, the fact that he had opened it and read it would not amount to publication by the person who read it...It is not part of a butler's duty to open letters which come addressed to the home of his master or mistress addressed to them and there is no presumption that a letter in an envelope which is ungummed is to be treated just as a post card."

Maskell *v.* **Horner** (1915) 3. K. B. 106.

Money had and received—Market tolls paid under protest and under threat of seizure of goods—Levy unlawful—Action for amount—Whether money paid under mistake.

Certain tolls were demanded of the plaintiff by the owner of a market and he paid the same under protest and under threat of seizure of goods and also because other persons like himself paid them. The levy of toll was found to be unlawful. *Held,* in an action for recovery of the tolls paid, that they were recoverable as money had and received as they were not voluntary payments but paid under protest and under circumstances showing no intention to give up his right to the same. *Held,* further, that they were not payments under a mistake of law or of fact as they were made merely to avoid being involved with the defendant.

JOTTINGS AND CUTTINGS.

The Wrong Practitioner.—He was a surly and quarrelsome old farmer, and the only person of any importance who had managed to avoid clashing with him was the mild-mannered vicar, relates the Boston Post.

But even this forbearing gentleman lost his temper when the farmer impudently turned his horses loose in the Churchyard and refused to make them out again.

High words ensued, and the vicar so far forgot himself as to call the farmer a "broken down old mule."

Off went the farmer on the instant and crashed noisily into the village Lawyer's office.

" The vicar has just called me a broken down old mule !" he bawled..." What am I to do ?"

Now, the lawyer had once received a severe rebuff from the farmer and had waited for years for a chance to repay it. Here was his opportunity and he seized it with both hands.

,'Don't come to me about that," he said coolly. "I can't patch you up. I'm no veterinary surgeon"—*Case and Comment.*

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An Unfortunate Simile.—" There are times," observes a member of the bar, when a lawyer regrets the use of an illustration which a moment before has appeared especially felicituous.

" The 'argument of my learned and brilliant brother,' said the counsel for the plaintiff in a suit for damages from Street-car Corporation in Boston, ' is like the snow now falling outside—it is scattered here, there, and everywhere.'

" 'All I can say, ' remarked the opposing counsel, when his opportunity came, ' is that I think the gentleman who likened my argument to the snow now falling outside may have neglected to observe one little point to which I flatter myself the similarity extends—it has covered all the ground in a very short time.' "—*Ibid.*

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Lord Halsbury's Ninetieth Birthday.—Lord Halsbury, who long ago earned the title of the 'Grand Old Man' of the Law, will complete his ninetieth year on Friday, having been born on September 3, 1825. Every member of the profession, proud of his extraordinary record of unabated vigour, will cordially wish him many happy returns of the day. It is sixty-five years since he began his distinguished career at the Bar, and thirty years since he began his unusually long tenure of the Woolsack. So sure has been his possession of the secret of perennial youth that, notwithstanding his approach to the nonagenarian stage, he has remained one of the youngest men in the profession. When ten years ago, Mr. Choate was entertained by the Bench and Bar of England on his retirement from the office of American Ambassador, he made a very felicitous allusion to the irrepressible vitality

of Lord Halsbury, who, as chairman of the gathering, had proposed his health. Quoting the familiar lines, 'time, like an ever-rolling stream, Bears all its sons away,' Mr. Choate observed: 'But the Lord Chancellor seems to stem the tide of time. Instead of retreating like the restof us before its advancing waves, that happily he is actually working his way up stream' is scarcely less true to-day than it was ten years ago. Two other Chancellors of the Victorian era lived to be nonagenarians; Lord Lyndhurst was ninety-one when he passed away, and Lord St. Leonards reached the age of ninety-three. The 'Lyndhurst of our day,' as Sir Edward Clarke has aptly called him, continues to display a mental and physical vigour which encourages the hope that his years will exceed those of any of his predecessors.—*The Law Journal, 28th August 1915.*

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It is interesting to note that the Master of the Rolls stated last month that neither a Jew nor a Dissenter is capable of being Lord Chancellor. Certainly, neither has ever held the post, though it has been offered to a Dissenter who did not take it. About twenty years ago Mr. Gladstone stated in the House of Commons that the Lord Chancellor could not be a Roman Catholic, but might in his opinion be a Jew, Mahomedan, Buddhist or Hindoo; and Mr. Asquith in the same debate said the office might be held by a Jew or Dissenter or Agnostic. *The Law Student's Journal, 1st September, 1915.*

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Chief Justice Fuller.—Shortly before his death, the late Chief Justice Fuller presided at a church conference. During the progress of a heated debate a member arose and began a tirade against universities and education, thanking God he had never been corrupted by contract with a college.

"Do I understand the speaker thanks God for his ignorance?" interrupted the Chief Justice.

"Well, yes," was the answer; "you can put it that way if you want to."

"All I have to say then," said the Chief Justice, in his sweetest musical tone, "is that the member has a good deal to thank God for."—Pathfinder. *Central Law Journal, Vol. 81 No. 6, P. 103.*

Humor of the Law.—John Deo, having taken a recent bar examination, was asked by his friend Richard Roe, how he came out, to which Doe replied:

"Well, I wrote Little on Mortgages and Trust Deeds, Moore on Facts, and Long on Domestic Relations. I fell on Guaranty and Suretyship and was Fuld on Police Administration, but Keener on Corporations. I got Wise on American Citizenship, but was Poor on Referees under the Code System. My Spelling on Trusts and Monopolies ranked me High on Injunctions and May on Insurance. I took a Knapp on Partition, was Tarde on Penal Philosophy, but started the Ball on National Banks and did my Best on Evidence. I was Hale on Torts, turned Gray on the Rule against Perpetuities, got Dropsie on Roman law of Testaments and pulled through by a Hare on Contracts." Case and Comment. *Central Law Journal. Vol. 81, No. 6, pp. 103*

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Christian Science and Practicing Medicine.—The Supreme Court of New York in an exhaustive opinion has affirmed the conviction of one Cole, a Christian Science Healer, for practicing medicine without a license. *People* v. *Cole* [1]. The evidence was that Cole had offices in the city of New York where he received his patients, and that while he did not make any definite charge for his services, taking, he said, what his patients offered him, he had an average income from his practice of six thousand dollars a year. Cole contended that in convicting him the courts were interfering with him in the practice of the tenets of his religious belief. But Clarke, JJ., who wrote the opinion of the Court, said that the court did not assume nor had it the power to assume the function of curtailing a man in the practice of his religious beliefs. The commercialized use of prayer, however, for the avowed purpose of treating all persons seeking cure for all kinds of bodily ills, was not the practice of the religious tenets of a church. Laughlin, J., while agreeing with Clarke, J., was of the opinion that the acts performed by the defendant if performed in a Christian Science Church or in visiting and administering to the members of the church without charge would not be a violation of the statute regulating the practice of medicine.—*American Law Review.*

* * *

The Jury Consumed the Evidence.—In Dakota recently a jury who was trying a man for a breach of the liquor laws of the State

1. 148 N. Y. S. 708.

were given three bottles of beer which he was charged with having in his possession for an illegal purpose and were allowed to take them into the jury room for examination. They soon returned with a verdict of guilty and left the court room; when lo, it was discovered that the bottles were empty. The Supreme Court ruled that a new trial must be awarded, saying:

"If the jury drank the contents of the bottle in order to test its qualities as an intoxicant they clearly violated the law, as they had no right to try any such experiment. Even if they drank it from a spirit of bravado prejudice will be presumed."—*Ibid.*

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An Astrologer is Not a "Fortune Teller."

In New York the defendant was charged with "pretending to tell fortunes," which is prohibited by the Criminal Code of New York [1]. The defendant did not deny the facts, but asserted that she was an astrologist by profession and her counsel argued for her on these lines:

"Astrology is the science which describes the influence of the heavenly bodies upon mundane affairs and upon human character and life. It is a mathematical or exact science, as it is based upon astronomy, which describes the heavenly bodies and explains their motions, etc. It is an applied science in that it takes the established principles of astronomy as its guide in delineating human character, and all its judgments are based on mathematic calculations. It is an empirical science, because its deductions are based upon accurate data that have been gathered for thousands of years. Astrology is the oldest science in existence. It is not only prehistoric, but pretraditional, and must not be classed with fortune telling or any of the many forms of demonology as practiced in ancient and modern times. Astrology is the science of the effects of the solar currents on the living things of earth, especially on human life.

In dismissing the charge the Court said:

"The status in question is peculiarly worded. 'Pretend to tell fortunes' are to be considered. This law was designated to prohibit persons who make pretence or make believe to tell fortunes. A deception or concealment of the truth is essential in each case. It is really a certain degree of quackery practiced to the

1. People v. Adams. N. Y. L. J., Jan. 4, 1915.

detriment of the community in general that is made unlawful by this statute.

"What is fortune telling and who is a fortune-teller? The Standard Dictionary says 'that to tell one's fortune or tell fortunes is to foretell what is to happen to one, or to practice the prediction of future events with reference to persons through some professed faculty of penetrating, or specific means of calling up, the secrets of the future.' And it defines 'fortune teller' as 'one who tells or reveals future events in the life of another; one pretends to a knowledge of future events and makes a practice of foretelling them.'

"When the defendant prepared her horoscope of the complainant and got the relative position of the planets at the time of her birth, basing this horoscope on the well known and fixed science of astronomy, she violated no law. Her explanation of the relative positions of the planets constituted no violation of law. For the palmist to tell that a certain line in the palm of the hand is the 'lime line' or the 'head line' or the 'heart line' has never been held, as far as I know, a violation of this law now under consideration, but it has been held to constitute one a disorderly person, within the meaning of this statute, to say that the life of a certain individual will be long or short. At best this is but a guess or conjecture. To prophesize that one will be more happy in the future than he has been in the past might under a certain circumstance constitute a violation of the said section of the Code of Criminal Procedure.

"The defendant has given ample proof that she is a woman of learning and culture and one who is very well versed in astronomy and other sciences. Her chart here, as made out, may be verified, as she states, by those who may be disputations on the subjects of its accuracy in the books and records of astronomers for years. And when the defendant stated to the prosecutrix that these planets and their relative positions indicated this or that, and this or that ought to happen, if the signs meant anything, with the distinct understanding had between them that the defendant was giving no assurance that this or that eventuality would take place, I say she violated no law."—*(Ibid).*

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The following extracts from Lord Alverstone's *Recollections of the Bench and the Bar* by the American Law Review are sure to be found interesting.

Like all great lawyers he has a high regard for his profession: "In reviewing the leading events of my professional life, I have been confirmed in the opinion that I have long entertained, that the Bar is a great profession for men of ability and industry. I have often said that, given that a man who knows his work has the courage and perseverance to go through the period of waiting, he will ultimately succeed. Of course there are degrees of success, and luck or good fortune has a great deal to do with the amount of it. But all said and done, if a man is competent and has the courage to stick to his work, I do not believe in absolute failure. Sir John Karslake, when asked what were the three things which were necessary for success at the Bar, said the first was tact, the second tact, and the third tact. He was not far wrong. I have seen many errors made, cases lost, and clients affronted by a want of ordinary tact on the part of the barrister. Of course, it will be remembered that when Sir Edward Clarke was asked what where the three essentials, he replied: 'To be very poor, very ambitious, and very much in love.' No doubt these qualifications also may have much to do with a man's success. I knew one barrister who for eight years never got any work at all. He was of untiring energy and very able. He stuck to his work manfully, and in the end acquired a very large practice."

* * *

(The division of the legal profession into barristers and solicitors.) "I am led at this point to refer to the question of a possible fusion of the two branches of the profession. I have always been, and still am, strongly opposed to the idea of fusion, and I shall refer to it again by way of illustration when dealing with international arbitrations. Dealing with the question on its merits, in heavy litigation a properly instructed barrister with all the facts before him is, in my judgment, the best qualified person to present a case in a way which will attract the attention of, and be easily followed by a tribunal which, for the first time, is called upon to listen to the merits of case, whether of law or fact. The solicitor who has been engaged in preparing the brief, and has perhaps brooded over it for several months, is apt to attach undue importance to particular incidents without sufficiently considering

their bearing as a whole, or their weight in connection with other incidents and arguments in the case. I frequently discussed the question with Sir Charles Russell, and he entirely concurred in my opinion; he held that a barrister coming new to the consideration of the facts is able to take a more detached view of the whole case, and to present it to a fresh mind as a complete story, putting the material incidents in their proper order, and not attaching undue importance to special facts. I asked Mr. Benjamin his opinion on the question, he having experienced both systems. He said he agreed that for a country with a long-established procedure, the English system was far the best; but he thought that for new and young countries which had not reached the state of final development, it would be difficult to maintain the separation which exists in this country, and that it was necessary that lawyers should be allowed to conduct cases in court as well as to act as solicitors. I can only say that in my opinion the existence of a body of men who devote themselves solely to advocacy, and have little or nothing to do with the cases until they are brought to them for conduct in court, has been of immense value to our English system of jurisprudence. The independence of the Bar arising from the absence of any personal interest in the success of proceedings has given them a position in public opinion which could not possibly be attained under any other system."

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The picture of the barristers' clerk.—"The position of barristers' clerks is anomalous and interesting. They are paid by the by client sfees of half a crown for a consultation, a five per cent. on the brief fees. I know of no other instance where the personal attendant on a professional man is paid indirectly by the clients. The result is that their good or ill fortune is linked together with that of their masters, and they learn to identify themselves with them. Many very amusing stories have been told about them, and are well known. One I do not remember to have seen quoted. Lord Herschell, then Mr. Herschell, had a clerk who was a great character. In the year in which Mr. Justice Willes died, Herschell came back at the end of the Long Vacation and asked his clerk what was going on. The clerk said: 'Nothing particular.' 'Well,' said Herschell, 'but haven't they been asking you anything?' 'Oh, yes;' he said, 'they have asked me whether we're going to take a *puisne* Judgeship.' 'What did you reply?' said Herschell. 'I

said "Thank God, we haven't fallen as low as that!"' An amusing incident came under my direct personal notice. When Mr. Justice Bowen, afterwards Lord Bowen, was offered a Judgeship in the Queen's Bench, he sent for me, as I knew him very intimately, and asked me what I thought he ought to do. I said: 'Well, Bowen, if you don't accept the Judgeship, you must take a silk gown and go through the hard work of the profession, and I doubt whether your health would stand it.' 'Well,' he said, 'it is strange you should have said that, when I tell you that during my eighteen years at the Bar I have been away for two whole periods of twelve months from ill-health.' Just at this time gossip said that Mr. Bowen was hesitating. Mrs. Bowen was anxious that he should accept the Judgeship. Block—that was his clerk's name—said, when asked: 'Our voice is weak, and the sooner we get on the Bench the better.' Strangely enough, it was a true summary of the position. I could tell of many other instances in which clerks have shown their acumen and loyalty to their masters, but the above which I have quoted will be sufficient to indicate the relations which prevailed between barristers and their clerks, and the attitude assumed by the latter."

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The English Barrister looks for his fee not to the client but to the Solicitor, and that the latter is not always trustworthy, Lord Alverstone discovered on one occasion: "I had received a guinea brief in a case in the City of London Court, which some friend of mine had returned. The next day the solicitor came to the Mayor's Court to speak to me about it. Salter saw him, and said to me: 'Don't you have anything to do with that fellow. He will just suck your brains, and never pay you.' I thanked him very much, and the next day the solicitor came to my chambers, No. 2, Pump Court, with a two-guinea brief for me to go to Judges' Chambers. I said to him: 'I will take this case on one of two conditions. Either you pay me the guinea I earned yesterday, or the two guineas on this brief.' He said, 'All right, sir, I will go and get the money.' He went away, and I never saw him again." There are several good stories in the "Recollectons" of lawyers and judges. Of a Mr. Brown, a leader at the Bar in his days, the author says: "He was a great lawyer, but somewhat slow and deliberate in his arguments. There was a good story current of him when I first knew him. It was said that while he was arguing

before Chief Justice Jervis—a man of very acute mind and a rapid thinker—and was proceeding with his usual caution, the Chief Justice interrupted him: 'Get on, Mr. Brown, get on!' Brown stopped. 'I beg your Lordship's pardon, but I apprehend that my arguments cannot proceed with as much rapidity as your Lordship's mind.' 'For God's sake, don't stop to tell me that said the Chief Justice." This of Pollock: "Chief Justice Abbott, afterwards Lord Tenterden, was presiding at the Yorkshire Assizes, which were then held at York only, and Pollock had to open the case for the plaintiff in a very heavy dispute about a colliery contract. He was called at five o'clock in the morning in order to read his brief, but happened to take 'The Heart of Midlothian,' and was so interested in it that he never touched the papers until breakfast time. The Court in those days sat at nine, and there was therefore no chance whatever of his mastering the case so as to present it in a proper form to the jury; he found, too, that some two or three hundred letters had passed between the parties. Accordingly, with the greatest coolness, he said to the jury: 'I could not better present the facts of the case to you, gentlemen, than by using the language of the parties themselves, and I shall therefore read to you the correspondence which has passed in chronological order.' This he proceeded to do, and had continued reading for nearly an hour, when Chief Justice Abbott, who was very much afraid of Pollock, thought it was time to intervene: 'Mr. Pollock, is it absolutely necessary for you to read all this correspondence? Cannot you condense it a little?' To which Pollock replied: 'Absolutely necessary, my Lord, for I never read it before.' Of course, in the face of such sublime impertinence there was nothing more to be said, and the case proceeded."

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And he tells this story of a distinguished English novelist and "a hard-working barrister by the name of Codd, who had a large family and was always struggling in his profession. In a post office prosecution, tried before Baron Bramwell at the Chelmsford Assizes, Codd was defending the prisoner. Among the witnesses was Mr. Anthony Trollope, the well-known novelist. He knew nothing about the facts of the particular robbery in question, but having an official position in the post office, he was called to prove the practice in the post office as to the sorting, removing,

and otherwise dealing with the letters, so that the Jury might understand what opportunity the prisoner had had for committing the theft. I need not say that in such cases the witness is as a rule not cross-examined, but makes his statement and leaves the box. Accordingly Mr. Anthony Trollope, to whom Bramwell had nodded, was leaving the witness box, when Codd, who saw an opportunity for making a point, said: 'Stop a moment, Mr. Trollope.' Trollope came back. 'What are you, Mr. Trollope?' said Codd; 'I have already told the Court that I am a supervisor in the post office.' 'But are you anything else?' Trollope replied: 'Yes; I am an author.' 'Ah!' said Codd, 'you are an author, are you? What was the last book you wrote?' Trollope replied: '"Barchester Towers,"' or whatever it was—the particular book is immaterial. 'Well, then,' said Codd, 'was there a word of truth in that book from beginning to end?' 'I do not understand what you mean,' replied Trollope. 'You can answer a plain question: Was there a word of truth in that book from beginning to end?' 'It was a work of fiction.' 'Fiction or not, was there a word of truth in it from beginning to end?' 'Well,' said Trollope, if you put it in that way, there was not.' Codd said: 'Thank you, Mr. Trollope,' and sat down. He called no witnesses, but made a violent speech to the jury, in which he asked them how they could possibly convict the prisoner on the evidence of the principle witness when the principal witness was a man who was obliged to admit that he had written a book without a word of truth in it."

CONTEMPORARY LEGAL LITERATURE.

In the *Harvard Law Review* for May, Professor Samuel Willinston controverts the position that a pardoned criminal is in the same position as if he had never committed the crime. The pardon removes all legal disqualifications attaching to *conviction* but it does not rehabilitate the man in so far as his character is concerned. A man convicted for perjury is under the Common law, disqualified from giving evidence. Pardon has the effect of removing this bar but does not and cannot remove the stigma on his credit. The disqualification or disability that attaches to the fact of the commission of the offence as distinguished from the conviction would still remain.

Mr. J. L. Thorndike argues that the grant of a general power exercisable by deed or will to a person to whom a life-estate is granted is not equivalent to the grant of an absolute estate to him and therefore such a grant is bad if the grantee was not in existence at the date of the grant by reason of the rule against perpetutites. This view is against the view of both Farwell and Gray, but nevertheless the writer thinks that both on principle and on authority the view propounded by him is the right one. In the case of a power, an estate does not become vested till the power is actually exercised and as such though the life-tenant who is the donee of the general power has got the capacity to convert himself into an absolute owner, it is wrong to regard him as an absolute owner.

Mr. C. N. Gregory discusses the effect of war on the operation of statutes of limitation. The rule laid down by the English Courts, *viz.*, that the statute of limitation is no bar to a party whether he be a subject of the realm or a foreigner who is not in England at the time the cause of action accrues and who continues to reside abroad has prevented the question from turning up in England as often it would otherwise have been. In England, the general rule seems to be that a state of war does not prevent the statute running. The reason as given in *Lee* v. *Rogers*, and *Backford* v. *Wade*, which are the leading English cases on the subject is that the statute does not provide an exemption in the case and therefore it should run. The American Courts have been somewhat more liberal and hold that the statute will not run when parties are so divided by the line of war that the plaintiff cannot have access to the court or when the court to which the plaintiff can have a right of recourse does not sit on account of the disorder of war. The writer thinks that the old English precedents can be got rid of in two ways, first, they refer to cases where the want of authority in the Courts alone was pleaded and not either the fact that there was no Court or that the party could not have recourse to Courts. Secondly, the rule that enemy's cause of action is suspended and not destroyed is of later growth and would seem to require the adoption of the more liberal rule.

Property in water is an article of interest in the Canadian Law Times for July which summarises the law as to waters, as

to the water of the high seas, of surface water, water running in defined natural channels and water in artificial channels.

Another writer questions the tendency of Courts to disallow costs on extra-judicial considerations such as that the parties were not "businesslike" or "might have been more generous" or "dissuaded testators from exercising charitable intentions" or "the plea was unmeritorious." He thinks that costs instead of being an indemnity for expense necessarily incurred in enforcing a legal right or resisting an unfounded claim, have come to be considered more or less in the nature of a bonus for the performance of certain indeterminate and unclassified works of supererogation, not affecting the determination of legal issues but opening up a large vista of moral and social proprieties or even coming to a point of questioning the policy of a statute which affords a defence to the suit.

The August issue of the same Journal contains an account of the life and work of Chief Justice Cockburn who was holding that office for 21 years from 1859 to 1880. He took part in many important cases which have settled the law among others *Campbell* v. *Spottiswoode*, *Sugden* v. *Lord St. Leonards*, the *Tichborne case* and *Queen* v. *Keyn*. On one point he felt very strongly and that was that witnesses were just as necessary for the administration of justice as judges or jurymen and are entitled to be treated with the same consideration and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or the jurymen and no questions ought to be allowed unless they are clearly pertinent to the issue before the court except where the credibility of the witness is deliberately challenged by counsel. The lofty conception Cockburn had formed of the duty of an advocate found fitting expression in a speech delivered at a banquet given by the Bar to the French Advocate, M. Benger. Lord Brougham in response to a toast had said "the first great quality of an advocate is to reckon everything subordinate to the interests of his client". Shortly after, Chief Justice Cockburn in replying to the toast of "the Judges of England" said: "Much as I admire the great abilities of M. Benger to my mind, his crowning virtue—as it ought to be that of every advocate is that he has throughout his career conducted his cases with

untarnished honor. The arms which an advocate weilds, he ought to use as a warrior; not as an assassin. He ought to uphold the interests of his clients *per fas* and not per *ne fas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice." Of these words it has been said: "They are the best epitaph which can be bestowed on Sir Alexander Cockburn".

In the *American Law Review*:—(July—August) Mr. R. H. Rogers elaborates the view that equity to start with was not at all a system of jurisprudence but the exercise of King's grace in matters in which the King or his Chancellor as the keeper of his conscience thought the law had worked harshly. The Chancellor had his ordinary jurisdiction in which he was in the same position as other courts but in so far as he was exercising the King's power of *mercy* he was acting above the law. The principles on which the Chancellors acted were reduced to a system when the early ecclesiastical Chancellors were succeeded by *Lawyer Chancellors*. The essential difference between the jurisdiction of courts and of the Chancellor is brought into relief by this circumstance, namely, that while the House of Lords reversed the judgments of the law courts, it only advised the King to interfere when the appeal was against the decision of the Chancellor in his extraordinary jurisdiction.

Mr. E. A. Macullcch gives a life of Earl Cairns, the great Victorian Judge of whom Lord Bryce says "as a Judge he will be held in honorable remembrance as one of the five or six most brilliant luminaries that ever adorned the English Bench since those remote days in which the beginning of legal memories is placed." He was an ideal judge and he looked it. He not only bent every effort to decide a case correctly but he knew how to hear a case with incomparable patience. He was not too reticent and no one could complain that he was too outspoken. He rarely ever interrupted counsel and never for the purpose of provoking a controversy or to expose the ignorance of the advocate. When he did ask a question, it was with such grave and respectful manner as not to offend or confuse but to bring to the surface some principle about to be overlooked or to suggest the application of one with unmistakeable clearness which put an end to further contention on that point. It is related of him that on one occasion while he was presiding in the House of Lords,

one of the Judges who had acquired the habit of sharply interrupting counsel with frequent questions commenced to do so, and he interrupted with the suggestion that the court was desirous of hearing the arguments of counsel and not of putting questions to him. His opinions were not lengthy but strong and couched in lucid language which left no doubt what he meant to decide. They reached to the vital principle of the case without unnecessary display of learning and in the fewest words possible. There was a paucity of authorities cited in his opinions as in his arguments before the bar but when there were cases really in point, he referred to them and analysed them with discriminating nicety. The precincts of the Court were to him sacred and no one was allowed to forget that the administration of the law was too serious a business to admit of levity.

BOOK REVIEWS.

INDIAN CONSTITUTIONAL DOCUMENTS, *by Panchanandas Mukherji, M. A., by Thacker Spink & Co., Calcutta.*

People interested in Indian Constitution are under deep obligation to Mr. Mukherji for his bringing together the various statutes bearing on the subject together with what is even more important because not easily accessible, extracts from the speeches of responsible Ministers and Viceroys relating to the question Despatches and Royal Proclamations. Books like this are indispensable for a study of the subject. The introduction is also sure to be felt helpful.

THE INDIAN COMPANIES ACT, *by S. Kasturi Rangachari, Lawyer's Companion Office.*

This Edition of the Companies' Act is bound to be popular with the profession. It has the merit, the rare one, of giving all the information that is ordinarily necessary to be had in connection with the company law of this country.. It gives the entire English and Indian case law bearing on each section of the act arranged after the convenient manner of other Lawyer's Companion publications. It contains the English Act and a table giving corresponding references to that act as well as to the earlier Indian Acts. It gives all the minor acts relating to societies analogous to companies, such as the Presidency Banks Act, Co-operative Societies' Act, etc. The rules framed under the Act form one of the Appendices. We heartily commend the book to the profession.

JOTTINGS.

The Law Dinner.—The farewell dinner arranged by the Advocate-General in honor of Sir C. Sankaran Nair was a complete success, more than 130 people having been present. Sir Leslie Miller, three Indian High Court Judges, Sir Hugh Fraser, the Registrar of the High Court and a respectable number of Barristers, Vakils and Solicitors attended. Sir Sankaran Nair's European Colleagues were conspicuous by their absence, whether by accident or otherwise we do not know. In addition to the customary felicitations, some interesting points were touched on in the speeches that were made. The Advocate-General while prepared to make an exception in favour of Sir C. Sankaran Nair and to congratulate the Government and the people of India on the wise selection made in this particular instance, expressed approval of the principle adopted by the Indian Government of not holding out prospects of promotion before Puisne Judges of the High Court, and quoted the high authority of Lord Brougham in support of his position. He also referred to the question of the reform of the legal profession a subject that has for sometime been engaging his earnest attention. Sir C. Sankaran Nair responding to the toast said that, as from his experience, he was not able to say there was much to choose between the ordinary litigant and the local Government, he was bound to admit the force of the objection to the local Government having power to promote a judge; but he added that the objection might not have the same force when the appointment is made by the Viceroy and the Secretary of State. He excluded the Civil Service from his remarks as they were powerful enough to protect their interests even against the local Government and therefore there was little fear that their independence would be affected by the prospect of a possible promotion. He said that there was also another aspect of the case to be considered *viz.*, whether the introduction of the judicial temperament into the Executive Council was not likely to benefit the administration. At any rate, if there was a Judge in the council, it was not likely for instance, that the argument of the High Court that failure to adopt measures for the prompt administration of justice leads to larger resort being had to the Criminal Courts would have failed to convince the Government. Speaking of reforms

in the legal profession, of the dual agency in particular, he quoted Mr. Benjamin's opinion as to the relative merits of the double and the single agency *i. e.*, that while under the American system of single agency the interest of the clients was better served, the English system was helpful in producing a class of fair and powerful advocates of public causes. By the same person appearing as well as acting, there was the danger of his taking on some of the animus of the parties where cases are fought with bitterness and there is a tendency in Judges to attach more weight to the representations of Counsel instructed by a solicitor than to those of a pleader coming into direct relations with the client. Referring to the opinion of Sir Thomas Strange who thought that Natives of India were unfit to be pleaders as they would not have the moral courage to stand up for the rights of their clients Sir Sankaran Nair with a pardonable trace of pride, asked us to contrast those conditions with the present..

Sir Leslie Miller speaking for the Bench appealed for sympathy towards the hardworked (we should add ill-paid) Subordinate Judiciary whom he feelingly described, as living in far off places, unfriended, without decent company, without even proper accommodation, deciphering undecipherable manuscripts taking down interminable evidence, working against time and trying to do justice to the best of their ability. If they did even in those surroundings administer justice fairly and impartially, said Sir Leslie. "All honor to them, but if, as may happen in "very rare instances temptation was too strong, and some of them "failed, let us temper our disapprobation with sympathy."

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RELIEF AGAINST FORFEITURE FOR NON-PAYMENT OF RENT WHEN THERE IS A PERIOD OF GRACE.

A difference of opinion exists in our High Court as to the power of the Courts to relieve against forfeiture for non-payment of rent in the case of agricultural leases when the lease allows a period of grace. *Narayana Naicka* v. *Vasudeva Bhatta* [1] *Narayanakamti* v. *Handu Shetty* [2], *Adiraja Shetty* v. *Billa Tyampu* [3], *Mahalakshmi* v. *Lakshmi* [4], *Tungama Shettiti* v. *Korattie Shettiti* [5], and certain other unreported cases take the view that the Court has not got the power while *Appayya Shetty* v. *Mahammad Beary* [6], and certain other cases (S. A. 494/97 ; S. A. 136/103 ; S. A. 2568/12) hold that the Court has power to relieve notwithstanding such period of grace. The two different views indicate two different standpoints as regards the foundation of the Court's jurisdiction. The former set of cases proceed upon the view that the Court has power to relieve only where on the construction of the document it appears that the parties intend the clause of forfeiture to operate merely *in terrorem* while the other set of cases hold that apart from any question that the clause was intended to be *in terrorem* or to be enforcible, wherever the clause is as a matter of fact inserted to secure payment of money, the Court has jurisdiction to relieve. There could be little doubt that the English Law as well as the rule enacted in S.114 Transfer of Property Act proceeds upon the latter view. (Story S. 1315). Though in many reported English cases on the subject it will be found that the provision was that the forfeiture was to accrue only on the rent being kept in arrear for a certain period *Wadman* v. *Calcraft* [7] *Sanders* v. *Pope* [8] *Bowser* v. *Cobby* [9] (in fact that is given as the usual form of lease in Woodfall's Landlord and Tenant) at no time was any argument based upon this peculiar clause as excluding the Court's jurisdiction. The case in *Narayana Naicka* v. *Vasudeva Bhatta* [1], recognises the inconsistency of the rule laid down by their Lordships with S. 114 Transfer of Property Act but their Lordships consider

1. (1903) 15 M. L. J. 208.
2. (1901) 15 M. L. J. 210.
3. (1910) 20 M. L. J. 944.
4. (1911) 21 M. L. J. 960.
5. (1912) 16 I. C. 803.
6. (1915) 29 M. L. J. 381.
7. (1804) 10 Ves. Jun. 67: 32 E.R. 768.
8. (1806) 12 Ves. Jun. 283: 33 E.R. 108.
9. (1841) 1 Har. 109 : 66 E. R. 959.

that even that section does not exclude a discretion in the court to refuse to relieve when there is a period of grace.

That this view of the English law is right is clear from a consideration of the rule as to mortgages. The principle on which relief is granted against forfeiture for non-payment of rent in the case of leases is the same as that on which redemption is allowed in the case of mortgages notwithstanding a condition that the sale should be absolute in the case of non-payment on the due date. These cases are not pari materia with cases of contracts for the sale of land where though equity regards time as not of the essence of the contract it is open to the parties to make it so. *Stickney* v. *Kuble* [1]. Relief against forfeiture was so much favoured in equity that it could be had at any time however long after eviction till the inconvenience of this was so felt that legislature intervened and reduced the period to six months after eviction. Though it is said that the relief is discretionary, it is hardly ever refused (Redman p. 542) and the only case referred to in text books in which the Court exercised its discretion against the tenant was a case where the landlord had on the faith of the eviction entered into new arrangements with respect to the land which could not be disturbed without great loss to him. *Stanhope* v. *Haworth* [2]. While conceding so far that the English law is distinctly in favour of the view taken in *Appayya Shetty* v. *Mahammad Beari* [3], it must we think be admitted that the other view finds support in the language of the cases which introduced the English doctrine into India. As already stated, the Court's interference in the case of mortgages being on analogous grounds to those in the case of leases, we shall consider the cases on mortgage is first and then cases on leases. Up to 1858, the decisions of the Court of Madras with one exception, enforced the contracts of parties without reference to any principle of equity. In 1858, the current of decision was suddenly turned the Court observing "the established practice in England is to recognise in the mortgagor a right of redemption, notwithstanding that the time stipulated for foreclosure may have passed by' and they do so on the ground that the repayment by the mortgagee of the money lent by him, with interest is an equitable discharge of his claims. The Court of Sudder Adalut recognises the justice of this principle * * the clause of forfeiture in a mortgage deed the Court views as introduced *interrorem* by

1. (1915) A. C. 386. 2. (1886) 3 T. L. R. 34.
3. (1915) 29 M. L. J. 381.

way of a penalty and it is not the practice of the Courts of Equity to enforce penalties. They merely accord to the several parties their just and equitable rights ascertained on consideration of the value that has passed from the one to the other which has to be recovered back." As remarked by their Lordships of the Privy Council in *Thambuswami Mudali* v. *Hussain Rowthen* [1], it will be seen that the Sudder Court did not adopt the English equity principles in their integrity. They treated the stipulation in favour of the mortgagee as a mere penalty and made no provision for his getting the benefit of it by the machinery of a foreclosure suit. The course of decision begun by the Sudder Court was followed by the High Court in *Venkata Reddy* v. *Parvathi Amma* [2], *Nallanna Goundan* v. *Palani Goundan* [3]; *Raja Lakshmi Chelliah* v. *Krishna Bhupati Deva* [4]. In the first of these cases, Chief Justice Scotland recognised the mortgagee's right to a decree for foreclosure which does not seem to have been admitted by the earlier decisions. In the second, the Judges treated the law as settled in almost absolute conformity with that administered by the Court of Chancery. A similar alteration of the law was made in Bombay in 1864. While animadverting upon the course taken by the courts, their Lordships thought it right to say in *Thumbusamy's Case* [1], that "in the case of a security executed since 1858, there would be strong reasons for recognising and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted." Barring the check received from the Privy Council, the law as to leases had an almost exactly similar growth. In *Cutenho* v. *Souza* [5], the Court held that a forfeiture legally incurred could not be relieved against. But in *Kottal Uppi* v. *Edavalth Thathan Nambudiri* [6], the High Court in second appeal relieved against the forfeiture without referring to the earlier case. The *ratio* of their Lordships' judgment may be gathered from the following extract from the judgment. "In determining whether such a condition (*i. e.*, forfeiture) should be enforced, we think that we should consider whether it was intended by the parties to be a penalty for the purpose of securing the payment of rent. It has been land down in *Peachy* v. *Duke of Somerset* [7], that the true ground of relief against penalties is from

1. (1875) I. L. R. 1 M. at 19.
2. (1863) 1 M. H. C. R. 460.
3. (1865) 2 M. H. C. R. 420.
4. (1871) 7 M. H. C. R. 6.
5. (1862) 1 M. H. C. R. 15.
6. (1871) 6 M. H. C. R. 258.
7. (1720) 1 Strange 447, 93 E. R. 626.

the original intent of the case where the penalty is designed only to secure money and the Court gives all that was expected or desired. What then was the intention of the parties? It was certainly the intention to create a perpetual tenure. The land appears to have been to some extent waste and it was agreed that the 2nd defendant was to render the said waste land cultivable to hold and to cause to hold and enjoy it permanently (for ever) for himself and his heirs. This being the principal intention of the parties, it could hardly have been anticipated that the 2nd defendant having laid out capital and labour on the property would be content to forfeit his improvements on account of the trifling rent and the intention was that the rent should be regularly paid and the condition of redemption was intended as a penalty to secure such regular payment. To enforce such a penalty would in many cases be productive of hardship." Their Lordships accordingly gave only a decree for arrears of rent with interest at 12 % interest. The old "*in terrorem*" theory again. The Court did not follow the Equity rule and make a conditional decree for possession but wholly disregarded the penalty. Coming next to *Subbaraya v. Krishna* [1], we find Mr. Justice Innes stating and answering the question thus "and the question therefore, remains whether the stipulations are or either of them is, penal and not enforceable." The question is one as to the intention of parties at the time of the execution of the documents to be determined on the construction of the document and on a view of the attendant circumstances. I think looking at the terms of the agreement, to the effect of that the lease was to be forfeited for mere non-payment of rent in any one year together with all rights to improvements that there is very strong reason for saying that if this stipulation stood alone, it could not be held to have been seriously intended that it should be acted upon as it would be recognised to be grossly inequitable that improvements should be forfeited together with the lease. There is not the same ground for saying that the stipulation against alienation was not intended to be enforced but I think it may very well be that the stipulation as to the consequences of non-payment of rent was merely inserted *in terrorem*." On these grounds he refused to enforce forfeiture and gave a decree for arrears of rent. Mr. Justice Kernan while agreeing with the reasons of Innes, J. goes on to say "even if the

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1. (1882) I. L. R. 6 M. 159.

rent was in arrears and a forfeiture had accrued the proper decree would have been that the defendant should pay the rent and arrears and costs of suit and in default of such payment within a very limited number of days, possession should be delivered to the plaintiff. This is consistent with *Kottal Uppi* v. *Edavalth Thathan Numbudiri* [1] and is the course in Bombay *Timmappa Puranik* v. *Badya Kuppagoshi* [2]." The Bombay case accepts the Equity practice and refers to Story but the Madras cases, so far, cannot be said to have laid down a general rule that in all cases where there is a clause for forfeiture of non-payment of rent, the Court must relieve. With them, it is a question of construction in each case whether it s a penalty or was intended to enforce and if it is the former, the Court is entitled to relieve against the forfeiture. *Veguran* v. *Ranga Ayyangar* [3] refers to the Madras and Bombay cases and says that such a clause is penal and will be relieved against. 24 M. 269 does not carry the case further except that it is the case of a compromise decree and also seems to indicate that the Court has a discretion to refuse relief if the defendant denied title or deliberately withheld rent. Then we come to the case in *Narayana Kamti* v. *Handu Shetty* [4]. This is what their Lordships say: "In the instrument in the case, there is a peculiar proviso which does not appear in the cases cited. Here there is a covenant to pay rent on the 15th of April. No forfeiture is provided for on account of default in such payment. But it is provided that if the default continue until December, then the lease is to be forfeited. It appears to us that it was clearly not intended that the clause of forfeiture was to be merely *in terrorem*" and this case was followed in *Narayana Naicka* v. *Vasudeva Bhatta* [5], and the other *cases viz*, *Adiraja Shetty* v. *Billa Tyampu* [6], *Kottal Uppi* v. *Edanalath Thathan Nambudri* [7], *Tungama Shettiti* v. *Korathe Shettiti* [8], *Narayana Kamti* v. *Handn Shetty* [4], may be taken to rest the conclusion on the ground that where there is a period of grace, the forfeiture cannot be considered to have been intended merely *in terrorem* and therefore the Court has no power to relieve. It may also perhaps

1. (1871) 6 M. H. C. R. 258.
2. (1866) 2 B H. C. 63.
3. (1891) I. L. R. 15 M. 125.
4. (1901) 15 M. L. J. 210.
5. (1903) 15 M. L. J. 208.
6. (1910) 20 M. L. J. 944.
7. (1911) 21 M. L. J. 960.
8. (1912) 16 I. C 803.

be read as resting on the view that the forfeiture in such a case is not for non-payment of rent, but for continued default which being more akin to cases of forfeiture for grounds other than non-payment, the Courts have no power to relieve.

Having regard to the Equity practice of allowing relief even after eviction, delay in payment however long cannot be a ground on which relief can be refused. The ground of the exercise of the equity jurisdiction being as it is, *viz.*, that the penalty is a security for due performance of the covenant, the only grounds that can legitimately be a bar to the award of relief would be ; first circumstances that would make it impossible to sufficiently compensate the landlord ; secondly fraudulent conduct of the defendant which disentitles him to seek relief. In *Sanders* v. *Pope* [1], Lord Erskine declared that the Court had jurisdiction to grant relief in all cases where full compensation could be made, although the breach might have been wilful. This view was disapproved later but that was only in respect of breaches of covenants other than for payment of rent. It is possible to take either the one view which seems to be in accord with the case law in this country or the other which accords with the English law and seems to be more justifiable in theory but the intermediate view taken in *Ramakrishna* v. *Bahmaya* [2], that a period of grace is a matter to be taken into consideration in exercising the discretion against the tenant seems to be in accord with neither the one nor the other.

SUMMARY OF ENGLISH CASES.

Pwallbach Colliery Company *v.* Woodman : (1915) A. C. 634.

Nuisance—Authority to commit—Grant of—Circumstances from which implied—Trade permitted—Result of carrying on in reasonable manner—Nuisance not permitted unless necessary—Easement to spread dust not recognised.

Permission to carry on a trade cannot justify the committal of a nuisance though the nuisance is the result of carrying on the trade in a reasonable manner and in the ordinary way in which such operations are carried on in the locality in the absence of evidence that the trade could not be carried on at all without committing the nuisance.

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1. (1806) 12 Ves. 262 s. c. 33 E. R. 108. 2. (1912) 23 M. L. J. 814.

Earl Loreburn: If a nuisance has been committed, no one can excuse it by simply saying "I only did what is usually done in this country and I was not in any way negligent" the character of the locality may be considered when the question is whether or not there has been any nuisance.........Their duty to the neighbour is not merely to take care so as to avoid causing a nuisance. Their duty is to abstain from causing one at all unless they have a right to cause one as for example by statute or consent of the complaining party or of some one whose consent binds him, such consent may be proved like any other question of fact. It may appear from the conduct of the parties and the surrounding circumstances as in *Hall* v. *Lund* [1] or as in *Lyttleton Times Co.* v. *Warners* [2] where both parties agreed that the very thing which was done, should be done though neither of them expected that it would cause a nuisance. Permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. If it could be proved that the business authorised could not possibly, in a practical sense, be carried on without committing a nuisance, so that everyone must have known the purpose was to commit a nuisance or if some particular method of carrying it on had been authorised, which being faithfully observed had nevertheless necessarily resulted in an unexpected nuisance being committed, then it would have been different.

Lord Atkinson: From the authorities, it is clear that what must be implied is, not a grant of what is convenient or what is usual or what is common in the district or what is simply reasonable but what is necessary for the use and enjoyment in the way contemplated by the parties of the thing or right granted.

Lord Parker: Apart from implied grants of ways of necessity or of what are called continuous and apparent easements the cases in which an easement can be granted by implication, may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted.

The second class of cases in which easements may be impliedly created depends not upon the terms of the grant itself but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements

1. (1863) 1 H. and C. 676. 2 (1907) A. C. 476.

as may be necessary to give effect to the common intention of the parties to a grant of real property with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is used. But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant should be intended to be used in a manner which may or may not involve this definite and particular use.

Lord Sumner: A right to coal dust spread anywhere over the lessor's land in any direction and to any distance as the wind may chance to carry it is too indeterminate a right to be an easement.

Sharpness New Docks and Gloucester and Birmingham Navigation Company, (1915) A. C. 654.

Statute—Interpretation—Duty to construct bridge and maintain—Duty to improve or reconstruct—To suit altered conditions —Not implied.

An Act of 1791 empowering a canal company to make a canal by cutting if necessary a highway, required them to construct bridges as required by the commissioners appointed under the Act and from time to time support, maintain and keep them in sufficient repair. The question was whether the canal company was bound to reconstruct the bridge to suit the altered conditions of traffic.

Held, by the House of Lords, that the commissioners were *functi officio* as soon as they certified what was to be constructed and the duty to repair and support was only in respect of such a bridge.

The statutes the language of which has to be construed vary in expression and as they must be read as a whole, the materials for answering questions of interpretation ought primarily to be sought for within the four corners of the Act of Parliament.

Per *Lords Haldane, Parker and Parmoor*. It may be as stated by Lord Moulton in *Hertfordshire County Council* v. *Great Eastern Railway Company* [1], where persons acting under statutory authority interrupt a highway, they must, if nothing to the contrary is enacted, construct such works as will restore to the public its use and maintain these works, unless the statute provides otherwise.

1. (1909) 2 K. B. 403 at 412.

Lord Dunedin :—(*Lord Atkinson concurring*,) Authorisation by statute to do a particular thing makes the thing when done a legal act and imposes no liability. This has often been held, as in a question with private individuals. I see no reason why the principle is not equally sound in the case of a public right and when a statute which authorises goes on to provide what are to be the rights and obligations flowing from the execution of the Statutory Act, it is in it and in it alone the rights and remedies must be found.

Lennard's Carrying Company *v.* Asiatic Petroleum Company, (1915) A. C. 705.

Corporation—Personal defaults of—Meaning of—Managers.

Under the Merchant Shipping Act the owner of a ship is not liable for any loss or damage happening without his actual fault or privity. In this case, the shipowners were a limited company and their managing agents were another limited company. The active director of the latter company was a Mr. Lennard. He was the person who was registered in the ship's register as manager and was also a director of the former. The officials of the two companies were the same and the two companies did very much the same business. The question was whether the default of Mr. Lennard could be considered the default of the ship owners, a corporation. Their Lordships held that his default was to be attributed to the company and the company was liable.

Lord Haldane :—A corporation is an abstraction. It has no mind of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting, that person may be the board of directors itself or it may be and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association and is appointed by the general meeting of the company and can only be removed by the general meeting of the company. If Mr. Lennard was the directing mind of the company his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself. Upon the true construction

of the section the fault must be the fault of somebody for whom the Company is liable not upon the footing of *respondent superior* but somebody for whom the Company is liable because his action is the very action of the Company itself.

Parker *v.* Ship Black Rock: (1915) A. C. 725.

Workmen's Compensation Act—Accident in the course of and arising out of employment—Fireman required to provide his own provisions—Accident while getting back from shore after getting provisions—Not in the course of.

A fireman on board a steamship went ashore with leave to buy provisions for himself. On his way back, when getting into the ship, there was an accident and he was drowned. Under the contract of service, the crew had to provide their own provisions. The question was whether the accident could be considered as one arising out of and in the course of employment. Their Lordships held that it could not be so considered. Though the fireman was lawfully employed, he was employed in his own business and not on the business of his master.

The Eastern Trust Company *v.* McKenzie, Mann and Co., Limited: (1915) A. C. 750.

Executive Government—Duty of, to abide by law—Injunction—Restraining receipt from Government—Government not restrained—Receipt, contempt nevertheless—Discharge of injunction by failure of suit—Injunction binding.

Where under a contract between the Nova Scotia Government and the Company constructing a railway the Government had authority in case of non-payment of the labourers to pay them out of the moneys payable to the Company:

Held, that the Government's decision on the construction of the contract as to amounts payable on this head was not final.

It is contempt of court for a party who is restrained by an injunction to receive a payment which he is prohibited from receiving and it is nonetheless a contempt because there is or can be no injunction against the party making the payment

An injunction although subsequently discharged because the planitiff's case failed, must be obeyed while it lasts.

The non-existence of any right to bring the Crown into court such as exists in England by petition of right and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law or authorise the interference by the Crown with private rights at its own mere will. There is a well established practice in England in certain cases where no petition of right will lie under which the crown can be sued by the Attorney-General and a declaratory order be obtained. It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the courts are open to the Crown to sue and it is the duty of the executive in cases of doubt to ascertain the law in order to obey it, not to disregard it.

Larkin v. Long: (1915) A. C. 814.

Breach of contract—Procuring of—To compel plaintiff to become member of association—Actionable.

In order to compel the plaintiff to become a member of the Stevedore's Association, defendants induced labourers to break their contracts with plaintiffs thereby causing actual money loss to the plaintiff.

Held that the conduct of the defendants was actionable.

Dunlop Pneumatic Tyre Company v. Selfridge and Company, Limited : (1915) A. C. 847.

Contract—Consideration, necessity for—contract in two capacities—Validity of—Stranger to contract—Right of suit.

In consideration of plaintiffs' allowing certain discount, defendant's vendors had agreed not to sell below a certain price except in the case of genuine trade customers, to whom they might allow certain discount from whom, however, as plaintiffs' agents, they had to take an undertaking similar to their own. Defendants gave an undertaking and had the discount but sold the goods at lower rates than warranted by their agreement. In a suit by the plaintiffs for damages, their Lordships held that even assuming that the plaintiffs were undisclosed principals for whom the defendant's vendors really acted in taking the undertaking there was no consideration moving from the plaintiffs for the defendant's undertaking and as such the action failed.

Viscount Haldane: In the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaestium tertio* arising by way of contract such a right may be conferred by way of property as, for example, under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under a seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other persons at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain continental countries or of Scotland but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as agent. But again, in order to entitle him to sue he must have given consideration either personally or through the promisee, acting as his agent in giving it.

Two contracts, one by a man on his own account as principal and another by the same man as agent may be validly comprised in the same piece of paper. But they must be two contracts and not one. I do not think that a man can treat one and the same contract, as made by him in two capacities. He cannot be regarded as contracting for himself and for another *revo flatio*.

Duncan Rutherford v. William Acton-Adams (1915) A.C. 866.

Specific Performance—Right to compensation—Only in case of deficiency of subject-matter—Not for mis-representation on collateral matter—Remedies.

The right of a purchaser of land to obtain specific performance with compensation is only in cases where there is a deficiency in the subject-matter. It does not apply to a claim based upon a representation on a matter collateral to the contract. The only remedy in such cases is to sue for rescission or for damages for deceit or on the contract if there is one.

The alleged misrepresentation in this case was as to the mileage of fencing on the land. As shortly after repayment of the deposit, the purchaser entered into possession and had taken the profits, rescission was not possible. As no fraud or collateral contract was alleged, plaintiff's claim for damages on that ground also was held inadmissible.

In re **Weightman's Settlement. Astle** *v.* **Wainwright.** (1915) 2 Ch. 205.

Power of appointment—Power to two persons jointly or to the survivor by will—Appointment by both jointly—Reservation of power of revocation by deed to the appointors or survivor—Revocation and re-appointment by deed by survivor—Validity of.

By a power of appointment in a settlement, two persons were empowered to appoint during their joint lives by deed or deeds jointly executed by both of them either with or without power of revocation and re appointment; and it was also provided that in default of any such joint appointment, and so far as such appointment should not extend, the survivor of them may *by his will or codicil* appoint.

The two persons made a joint appointment by deed, with a proviso that it should be lawful for them both during their joint-lives and for the survivor of them during his life by deed or deeds to revoke the appointment wholly or partially. The survivor by deed revoked the appointment and re-appointed in favour of strangers.

Held. The appointors had power in their joint appointment to reserve a power of revocation by deed; and such power was validly exercised by the survivor. The re-appointment not having been made by will, the attempted new appointment was invalid.

In re **Safford's Settlement. Daires** *v.* **Burgers** (1915) 2 Ch. 211.

Power of appointment—Marriage settlement—Power to wife to appoint by will during the continuance of the intended coverture—Will made during coverture—Husband predeceasing wife—Valid execution.

Where in a marriage settlement, a wife was given a power to appoint "by will during the continuance of the intended coverture" such power was validly exercised if during coverture she made a will whereby she appointed the settled funds, though subsequent to the making of the will, the husband died and the wife survived him.

Mallam *v.* **Rose** (1915) 2 Ch. 222.

Easement—Light—Acquisition by prescription—Prescription Act S. 3—Occupier of the servient tenement holding it as tenant of the occupier of the servient tenement—Oral lease.

Where for a portion of the prescriptive period, the servient tenement was in the occupation of a tenant holding under a verbal lease from one who had taken on lease both the dominant and the servient-tenement, the dominant owner is not by reason of the above fact prevented from acquiring the right to light through the windows in the dominant tenement, by prescription under the Prescription Act. Prescription Act S. 3, requires for the prevention of the acquisition of an easement that it should be "enjoyed by some consent or agreement expressly made or given for that purpose, by deed or writing." There having been only a verbal tenancy in this case, the owner of the dominant tenement has acquired a right to light by prescription.

In re **Limend. Limend** *v.* **Cunliff** (1915) 2 Ch. 240.

Will—Soldier's will—Actual military service—Attestation—Bequest to attesting witnesses—Validity of—Wills Act 1837, Ss. 11, 15.

Where upon the conclusion of military operations, a body of troops are left as an escort to the party engaged in the delimitation of the frontier and the testator who belonged to this body of troops was stabbed by the enemy and he dictated his will shortly after, which he signed and which was attested by two attesting witnesses in favour of one of whom he made a bequest.

Held, on a summons,

(1) The will in question was a soldier's will and so does not require the formalities under the Wills Act S. 9. The members of the escort so retained had not finished the expedition on which they had been sent and were still in actual service.

(2) Though the will was attested by two witnesses the will being a soldier's will in actual service, provisions of S. 15 of the Wills Act do not apply to it and the attesting witness takes a valid bequest under the will.

JOTTINGS AND CUTTINGS.

Humor of the Law. General Sabine, Governor of Gibraltar, having failed in his attempts to extort money from a Jew, sent him back by force to Tetuan in Morocco, from whence he had come to Gibraltar. The Jew afterwards went to England and sued the governor for damages.

Mansfield, who had not then received his title, was counsel for the governor. In the course of his defence before the jury he said:

"True, the Jew was banished, but where? Why, to the place of his nativity! Where is the cruelty, where the hardship, where the injustice of banishing a man to his own country?"

Mr. Nowell, counsel for the Jew, retorted: "Since my learned friend thinks so lightly of the matter, I ask him to suppose the case his own; would *he* like to be banished to *his* native land?

The Court rang with peals of laughter, in which Mansfield himself joined with a good will. *The Central Law Journal, Vol. 81, No. 7.*

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"A young man from the South," says a member of the New York Bar, "who, some years ago, was so fortunate as to be enabled to enter the law offices of a well-known New York firm, was first entrusted with a very simple case. He was asked by the late James C. Carter, then a member of the firm, to give an opinion in writing. When this opinion was submitted, it was observed that, with the touching confidence of the novice, the young man had begun with the expression. 'I am clearly of opinion.'

"Mr. Carter smiled as his eye caught this, and he said:

"'Son, never state that you are clearly of opinion on a law point. The most you can hope to discover is the preponderance of the doubt.'" *Ibid.*

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A famous Chicago lawyer once had a singular cause to settle. A physician came to him in great distress. Two sisters, living in the same house, had babies of equal age, who so resembled each other that their own mothers were unable to distinguish them when they were together. Now it happened that by the carelessness of the nurse the children had become mixed and how were the mothers to make sure that they received back their own infants?

"But, perhaps," said the lawyer, "the children weren't changed at all."

"Oh, but there's no doubt that they were changed," said the physician.

"Are you sure of it?"

"Perfectly."

"Well, if that's the case, why don't you change them back again; I don't see any difficulty in the case."—*Ibid No. 8.*

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"Did the lawyer for the defence submit you to a cross-examination?"

"No indeed: he was just as pleasant about it as he could be."

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Judge William H. McSurely, of the superior Court, told the following at a recent bar association dinner:—

"One day when Judge Gary was trying a case he was much annoyed by a man in the back of the room who kept moving about, shifting chairs, and poking into corners. Finally the judge stopped the hearing and said: 'Young man, you are disturbing the Court by the noise you are making. What excuse have you to offer for your conduct?"

"Why, Judge,' said the young man, 'I've lost my overcoat.'

"That's no excuse,' retorted the judge. 'People often lose whole suits in here without making half the disturbance.'"—*Ibid No. 10.*

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The Laws sat about the long green table. All the fundamentals were there save one. Even the decrepit Salic Law was present, dozing between the Mosaic Laws and the Law of Primogeniture. . . .

The chairman of the Law of the Land called the meeting to order.

"Are we all present?" he asked.

It was the Blue Laws who responded.

"I don't see nothin' of the Law o' Nations," he squeaked.

"The Law of Nations has been abolished," the chairman sharply replied. "The business of the convention will now proceed."—*Ibid No. 11.*

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Internment and the Royal Prerogative. A bold extension of the Royal Prerogative was claimed on behalf of the Crown by its responsible legal adviser in the case of *Rex* v. *Superintendent of Vine Street Police Station,* in which a considered judgment was delivered by a Divisional Court (Bailhache and Low, JJ.) last Monday. The Solicitor-General stated that he was prepared to argue for the existence of an inherent power vested in the Crown, during time of war, to arrest and detain without trial

during the continuance of the war any person it pleased, whether British subject, alien friend, or alien enemy. The legal grounds for this claim were not argued, since the Court in fact decided on a preliminary objection that the subject of the proceedings was an alien enemy, and, though a civilian, a prisoner of war; so that in accordance with settled principle, fully supported by precedents, he was not entitled to avail himself of the remedy of *Habeas Corpus*. But while the wider point was neither fully argued nor expressly pronounced upon by the Divisional Court which heard the application for a writ of *Habeas Corpus* in the Liebmann case, both judges made it clear that the proposition put forward by the Solicitor-General did not commend itself to the Court. The suggested right, indeed falls not one whit short of the 'suspending power' claimed by the last Stuart monarch and expressly declared illegal by the Bill of Rights; it would assert for the Crown an inherent right to suspend the *Habeas Corpus* Act of 1679 at its arbitrary discretion in time of war. This is a vast extension of the pernicious doctrine laid down in the celebrated case of *In re Marais* (1902), where the Privy Council—overruling old authorities and deciding contrary to the general sense of constitutional lawyers—held by a majority (as is generally understood) that while war is actually raging in any district the decision of a court-martial cannot be questioned by the civilian courts sitting in that district. But even this doubtful doctrine only applies where military operations are actually being carried on in the area where martial law has been proclaimed. and it applies only to the judicial acts of courts-martial, not to the arbitrary acts of the Executive Government. So long as England remains uninvaded by foreign troops—for Zeppelin raids are hardly a warlike invasion—the proclamation of martial law, except so far as permissible under the Defence of the Realm Act or other emergency statutes, is clearly unconstitutional, and precedents based on a state of affairs which does not at present exist are of no constitutional value. The refusal of *Habeas Corpus* to British subjects arbitrarily interned by Act of State would simply be to reduce such subjects to the status of alien enemies. It would destroy at one blow all the sacred meaning residing in the proudest boast of every Briton; *Civis Britannicus sum*.' *Law Journal*.

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Miscellany.—Reuter's correspondent, writing from Amsterdam (September 4), says that, according to the *Deutsche Juristenzeitung*, 1,964 German lawyers had been killed up to August 26, among them being 10 professors of law, 414 high administrative officials and judges, 1,176 minor judges, and 365 solicitors. *Law Journal.*

Economy and the Law.—The general desire for economy in public departments is providing some strange comments on the expenditure on the administration of the law. A reference in a popular weekly journal to Lord Haldane's position will serve to indicate how misleading some of these criticisms are :—

> Some weeks ago Lord Haldane was retired fromt the Lord Chancellorship. His salary was 10,000*l.* a year. On retirement he was promptly given the usual pension of 5,000*l.* a year. Now, the of the Lord Chancellor may be worth 10,000*l.* a year—few of us are competent to express an opinion on the point, though we may have our doubts—but certainly no man is worth a pension of 5,000*l.* after a few years' work. There is room for economy if you like !

Not a single word is written in *Reynolds'* to lead its readers to understand that Lord Haldane, like every ex-Lord Chancellor, renders most valuable judicial service for the 5,000*l.* a year he receives by way of pension. He takes a frequent and leading part in the judicial work of the House of Lords and the Privy Council, sitting, indeed, as regularly as any Lord of Appeal in Ordinary, whose salary is 6,000*l.* a year If the two supreme appellate Courts were without the services of the ex-Lord Chancellers, the number of their ordinary members would have to be increased, and the public purse would suffer rather than gain by the process. It is suggested that other judicial pensions afford a fitting scope for economy. Are we to understand that Parliament is to be invited to withhold or diminish the retiring allowances of the judges who, after serving the qualifying period of fifteen years, are now in the enjoyment of them ! A pension is merely a deferred payment of salary, and any interference with the judicial pensions now payable by the Treasury would be as gross a breach of faith as could well be imagined, while any arrangement by which the retiring allowances of future judges were decreased would inevitably impose upon Parliament the necessity of increasing their salaries. *Law Journal September 18.*

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Miscellany.—If the rumour that Mr. H. E. Duke, K. C. N.P., is to be appointed a Lord Justice should prove to be well founded, his promotion to the Court of Appeal direct from the Bar

(says the *Globe*) will be a rare but not an unprecedented event. Lord Justice Mellish Lord Justice Cotton, Lord Justice Thesiger, and Lord Justice Moulton were raised to the Appeal Court straight from the ranks of practitioners, and exceptionally good appointments they all proved to be. A still greater distinction belonged to Lord Macnaghten, who rose at one bound from the position of a Chancery K. C. to that of a Lord of Appeal in Ordinary. It is, of course, not an uncommon thing for an ex-Law Officer to reach these great judicial heights direct from the Bar, but it is a very unusual thing for an ex-official leader of the Bar to do so. All the existing members of the Court of Appeal have had their time of service in the courts of first instance, Sir Herbert Cozens-Hardy, Lord Justice Swinfen Eady, and Lord Justice Warrington in the Chancery Courts, and Lord Justice Phillimore, Lord Justice Pickford, and Lord Justice Bankes on the Common Law side.

In the House of Lords there are a considerable number of judges who have no judicial experience of the Courts whose judgments they review. The three ex-Lord Chancellors—Lord Halsbury, Lord Loreburn, and Lord Haldane—had no acquaintance with judicial life before they occupied the Woolsack, and the present Lord Chancellor resembles them in that respect. Nor had Lord Atkinson or Lord Shaw; the former was Attorney-General for Ireland when he was made a Lord of Appeal in Ordinary, while the latter was Lord Advocate. Lord Moulton, Lord Parker, Lord Dunedin, and Lord Sumner are the only ordinary members of the Supreme Court who have sat in the Courts below, and one of them—Lord Parker—leapt from a puisne judgeship to a Lordship of Appeal. Of the three Law Lords who take part pretty regularly in the judicial work of the House of Lords without being paid for their services, Lord Mersey and Lord Wrenbury are ex-judges of the High Court, while Lord Parmoor did not begin to sit as a judge until he was made a peer. *Ibid.*

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Trials 'in Camera'.—Among lawyers who take an enlightened interest in the principles of criminal jurisprudence much uneasiness is felt at the growing tendency of prosecutors and magistrates to hear in private summonses under the Defence of the Realm Act. Of course, in some cases these summonses relate to the procuring of information likely to prove useful to the enemy, and in such cases trial *in camera* is both necessary and

proper. But in a very large number of cases the charge is of a different kind. The defendant is accused of publishing statements calculated to prejudice recruiting or cause disaffection, and generally it turns out that the 'statements' which form the subject of the charge are simply the expression of extreme and misguided opinions on the merits of the war or the diplomacy of Sir Edward Grey. It is not easy to justify on grounds of 'public safety' the refusal of a trial in open court to persons accused of such offences, and the hearing of such cases *in camera* is in many cases nothing more nor less than an abuse of the powers conferred on the Court by section 3 (1) of the Defence of the Realm Act. Magistrates make every attempt to do their duties conscientiously but after all they are only fallible human beings, liable like others to have prejudices and preconceived opinions. The great safeguard against the danger of any magistrate being unduly influenced by his private opinion is the necessity he ordinarily lies under of hearing a case in public, where any mistakes he may make can be noticed and commented upon. Responsibility to enlightened public opinion is the best preservative of judicial good sense and impartiality. Remove this responsibility and abuses creep in. That is why our Common Law insists on open trial and only permits a private hearing where otherwise justice would be defeated. 'To justify an order for hearing *in camera*,' said Lord Haldane in the celebrated *Scott case* (1913), 'it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.' *Mutatis mutandis*: this Common Law Principle should guide justices as to the exercise of their statutory discretion under the Defence of the Realm Act. Trials *in camera* should only be ordered when the 'paramount object'—in this case, that of preserving the safety of the public—would really be 'rendered doubtful of attainment' if the hearing were open. The mere desire to deprive unwise individuals of a gratis advertisement of their views is not a sufficient reason for overriding the liberty of the subject. Lord Parmoor has behind him all the best legal opinion in his courageous support of this view in the House of Lords, where the constitutional rights of the lieges seem now to find their chief bulwark and protection. *Law Journal October 3 1915.*

CONTEMPORARY LEGAL LITERATURE.

In the "Law Quarterly Review" for July, there is a very learned article on Market Overt in the City of London, its antiquity, how far sale in market overt makes up for defective titles, to what extent the customs relating there to are Mercantile customs, how far local, and the extent to which these customs have survived the shock of modern times, whether a modern shop is an open shop within the meaning of the custom and many other interesting questions.

Mr. Courtney Kinney criticises the unwarranted introduction of criminal *purpose* as an element in the crime of treason, in the recent case of *King* v. *Ahlers* [1].

Mr. Paley Baildon hails the declaration of the Committee of Peerages in the St. John Peerage case that they would hereafter act on historical records and not on the *apriori* theories of lawyers and Judges.

Another article by Mr. Adolphus Ballard contains much learning on Township moots, what the terms Vill, Manor, parish and townships meant, their constitution &c.

Speaking of the administration of justice in America, a writer in the Central Law Journal (p. 13 says). "It is a good game but we ought not to make the mistake of calling it a system for the administration of justice. It administers justice no more than it administers injustice." "Shall we permit our legal procedure to continue, the great game which it is—a game under the control of private parties or shall we make the administration of justice one of the great duties of the State and the receipt of justice one of the great rights of the people."

Professor Lee writing in the Canadian Law Times of August says that "the better view would be to think of Government or of sovereignty not as the attribute of a specific person or body of persons—but rather as the animating force which diffused through the state is the source of its activity." "Sovereignty is" he says "the sum total, perhaps more correctly the combined result, of individual forces."

An article in the Law Magazine and Review dealing with reprisals in warfare says on the question of their legality (1) they have been recognised through all ages as a means of securing legitimate warfare (2) they ought not to exceed in severity the evil sought to be redressed (3) while it is eminently desirable

1. (1915) 1 K. B. 616.

that the persons to suffer from reprisals should be the actual wrong doers yet this is not a *sine qua non* and innocent persons may be made the victims. The writer is of opinion that if in the course of reprisals, neutral countries are injured, they are entitled to receive compensation for the loss sustained.

Chicago Legal News of July 17 gives an account of the German and French moratorium laws.

BOOK REVIEW.

SANJIVA RAO'S *All-India Civil Court Manual. Imperial Acts Vol. I. (Third Edition). Law Printing House, Mount Road.*

It was only five years ago that the first edition of this publication was brought out. The rapidity with which the two editions have run out shows the need felt by the legal profession for such a publication and the remarkable way in which the publishers have satisfied the need. Besides incorporating in the volume the Acts passed up to June 1915, the publishers have prefixed to the volume, a list of contents of each Act, which will be of great use to the practitioner. It is also worthy of note that the Government of India Act (5 & 6 Geo. V. Ch. 61) which was passed so lately as the 29th July 1915 finds a place at the end of the volume, on account of its supreme importance.

A SUPPLEMENT TO INDIAN CONSTITUTIONAL DOCUMENTS, *by Panchanandas Mukherji, M. A., Calcutta Tharker Spink & Co., 1915.*

As the Government of India Act, 1915 came too late for inclusion in the original volume, it is published as a supplementary volume. This statute brings up to date the record of constitutional land marks along which the Indian constitution has developed since the acquisition by the East India Company of the Dewani of Bengal in 1765. It is not too much to say that no student of the Constitutional History of India should fail to be in possession of this volume and the original volume to which this is a supplement.

DIGEST OF CASES ON MORTGAGE AND CHARGE, *by Bakshish Lal, Pleader—Rajniti Press, Patna, 1915.*

This is a digest of all the Indian cases reported hitherto on the subject of mortgages and charges to be issued in monthly parts. It is hoped that special attention paid to one branch of the law will serve to make the digest complete.

The Madras Law Journal.

PART XVIII.] NOVEMBER 1915. VOL. XXIX.

SIR C. SANKARAN NAIR, KT., C. I. E.

It has not been the tradition in Madras for Indian Judges of the High Court to retire into rest and leisure, Sir Subramanya Aiyar (who is happily still with us) being the sole exception. Sir Sankaran Nair has laid down the high office that he has held now for nearly eight years, only to enter upon another office no less exalted, upon new duties no less responsible, to which it has pleased his Sovereign to call him. It is thus not time yet to review his public life; but his retirement from the High Court, which may well be taken to mark the end of a thirty-five years' connection with the administration of justice in this Presidency seems a fitting occasion for appraising the value of the share he has borne therein.

After a distinguished academic career, Mr. Sankaran Nair was enrolled as a Vakil of the High Court in 1880; and he remained at the Bar for more than a quarter of a century, during which period (besides having been a Munsif for a short time in the early eighties) he acted as Government Pleader on more than one occasion and finally became Advocate-General of Madras. As an Advocate, his ideals and ways seemed more akin to those of the English Barrister than of the Indian Vakil. He was not of what may be called the 'digest type' of lawyer and rarely indulged in citations of authority except when they were strictly relevant; but he was known for clearness and force of argument, if not for the monumental industry or deep and laborious erudition of some of his older and younger rivals. With compeers like Messrs. Bhashyam Iyengar and Subramanya Aiyar in the earlier days and Messrs. Krishnaswami Aiyar and Sundara Aiyar in later days,

it should have been no easy matter for Mr. Sankaran Nair to acquire and maintain a reputation in the profession ; but he did attain a marked measure of success and for many years commanded a lucrative practice.

Sir Sankaran Nair, however, owed his position and influence in public life, not so much to success at the Bar as to his activities in other spheres. An earnest student of politics and economics, he early interested himself in every movement that concerned the social and material progress of his countrymen. As the acknowledged leader for many years of educated opinion on the West Coast, as a strenuous advocate of reform, political, social and legal, as a critic alike well-informed and out spoken, of men and things, whether high or low, he soon became a force not lightly to be disregarded. Amongst his varied pursuits (in the early nineties of the last century) were his work as Editor of the 'Madras Review' and his share in the starting of this journal, though his connection, in either case, was of comparatively short duration. At the early age of 32, he was nominated a member of the Madras Legislative Council and he continued to sit there for several years. His tenure of membership there is, of course, associated with that unsuccessful experiment in social legislation, the Malabar Marriage Act ; but it synchronised with the eventful period during which the political experiment heralded by Lord Cross's Act was under trial and on its success the future of the Indian Councils depended. In 1897, Mr. Sankaran Nair was honoured with the presidency of the Indian National Congress, he being, if we are not mistaken, the youngest of those called upon to preside over the deliberations of that body.

With such a distinguished record behind him it was no wonder that he was selected to act as Government Pleader and Public prosecutor, during the absence on leave of Mr. Powell and to act as a Judge of the High Court, during the absence of Sir S. Subramania Iyer in 1905 and of Mr. Justice Davies in 1906. It was also his enviable lot to be the first Indian to be appointed Advocate-General, as permanent incumbent. But he had been in office only for a short time when, on the retirement of Sir Subramanya Aiyar, towards the end of 1907, he was appointed a Judge of

the High Court. It only remains to add that official preferments one after another, are believed to have come to him, not by the favour of the men in power on the spot, but sometimes in spite of them and always in due recognition of his position in Indian public life, his intimate knowledge of Indian affairs and his fearless independence.

As a judge, Sir Sankaran Nair did not attain that level of greatness and distinction which he attained in other spheres and activities. He was remarkably independent and some of his pronouncements are characterised by breadth of outlook and freedom from technicalities and generally upheld progressive rather than reactionary tendencies in laying down rules of law, especially, in dealing with topics of law dealing with social life and rights of women. With his large experience he was a shrewd judge of human nature and was particularly successful in dealing with First appeals and Criminal appeals. In administrative matters too he made his strong personality felt.

Of the work that lies before Sir Sankaran Nair we are full of hope. His aptitudes, and if we may venture to say so his aspirations too, point to it as his proper sphere. We are not unmindful of the limitations besetting his new office. But the portrait drawn by Sir Ali Imam of the lot of the Indian member in the Viceroy's Council does not seem to have disheartened Sir Sankaran Nair and we believe he meant it in earnest when he told us the other day that he looked forward with confidence to his career in the Viceroy's Council. If the Indian member has yet to make himself felt in the moulding of the general policy of the Indian administration, none more fitting can be found to help towards the attainment of that end. As to the special charge assigned to him, his task will be by no means easy, but it is worthy of, and will surely call forth, his best efforts. The country looks forward to the new member's regime with eager expectation. We wish him all success and health and strength to strive for it.

BOOK REVIEWS.

INDIAN DECISIONS (NEW SERIES) *Bengal High Court Reports,* Vol. I. *Law Printing House, Madras.*

After exhausting the Indian Law Reports, Messrs. Venkasamy Rao and Krishnasamy Rao have with commendable zeal, turned to the Bengal Law Reports of which the 1st two volumes appear in the present volume. This series proceeds on the same plan as the Law Reports series and will supply the profession with a reprint of those valuable reports at a moderate price with the additional advantage of notes. After finishing the High Court Reports, it is the ambition of the publishers to print all unreported decisions wherever found. We hope that the profession will extend to the publishers the same ready response as they have done to their earlier ventures.

SANJIVA RAO'S *All India Civil Court Manual. Local Acts United Provinces of Agra and Oudh, 2nd Edn. The Law Printing House.*

The publishers have placed the profession under obligation by making the Acts of U. P. and Oudh accessible to them in a decent up-to-date volume which for its size, seems to be moderately priced.

The Madras Law Journal.

PART XX.] NOVEMBER 1915. VOL. XXIX.

MAKING REVERSIONERS PARTIES TO MORTGAGE SUITS AGAINST HINDU WIDOWS.

(*Continued from p. 35*)

The reasoning in *Ramachandra* v. *Kallu* [1] does not carry one far. The suit was for redemption by a presumptive reversioner and most of the considerations referred to in the judgment relate to what the learned judges call 'the difficulty of carrying out a decree for redemption in a case of the kind'. These seem to us by no means serious. For instance, they ask, how is the reversioner to be put into possession on redemption when the widow is still alive? The obvious answer is, he is put into possession *not as reversioner* but only as a person who has redeemed. The same question may be asked and the same answer given in respect of every one of the several classes of persons specified in clauses (*b*) to (*g*) S. 91 of the Transfer of Property Act. Again, they point out that on failure to redeem the law works a foreclosure and ask how is this to be applied to a reversioner "who may ultimately never become entitled to the property"? Here again, the answer is given by the question, how is the rule to be applied to a surety or to an attaching creditor (cl. (*c*) and (*f*)): for in their case also the necessity may never arise for them to proceed against the mortgagor's interest in the property. And likewise, the result of a suit brought by any one of the kinds of persons specified in the several clauses of S. 91 will not be binding against the other classes of persons. The one substantial argument in the judgment is that a reversioner's 'interest' is not such as can be held to fall within Sec. 91 clause (a). Though it may not be accurate to confine Sec. 91 (a), as the learned Judges do, to 'present interests' (as contrasted from 'contingent rights'), it must be taken that the clause applies only to such persons as can be said to have a legal interest in the property and not to all who may be said to be 'interested' in the property in the popular sense. (Cf. *Roshan Singh* v. *Balwant* [2] where the Judicial Committee incline to the

1. (1908) I. L. R. 30 A. 497.

2. (1899) I. L. R. 22 A. at p. 199.

view that a right to maintenance out of but not charged on the property will not be within the clause). But it does not follow from this that a reversioner cannot be considered to fall within S. 85. Justice Sundara Ayyar points out that the word 'interest' should receive the same interpretation in both the sections. There is at least one obvious reason against this. The result of such a construction will be to exclude from the scope of S. 85 the several classes of persons specified in clauses (*b*) to (*g*) of S. 91, for it would be hardly reasonable to contend that they also fall within clause (*a*) of the section; but the exclusion of those persons from mortgage suits will be inconsistent with well established English practice. It must therefore be allowed that the description of parties in S. 85 cannot be confined to those falling within clause (*a*) of S. 91. It must also be remembered that there is a fundamental difference between the scope and object of S. 85 and that of S. 91. The latter section is necessarily limited and definite because it *confers a right to relief* and it is only reasonable that a person coming forward as plaintiff should be called upon to show a specific interest or title in himself. S. 85 on the other hand is intended to lay down the well-established rule of practice that a mortgage action should be so constituted as to enable the court to pass a comprehensive decree and avoid multiplicity of suits.

But assuming that a presumptive reversioner is not a 'necessary' party within the meaning of S. 85, it seems to us too much to hold that he is not a 'proper' party at all, in the sense that he cannot be impleaded by the mortgagee if he so chooses or intervene on his own application. Whatever may be said as to S. 85 of the Transfer of Property Act, which saved only S. 437 of the Civil Procedure Code, O. 34 r. 1 of the new Code enacts the rule of joinder, generally 'subject to the provisions of the Code' so as to let in the operation of O. 1 r. 10 (2). The fact that even without the presence of the presumptive reversioner, the suit can be disposed of as between the widow and the mortgagee does not necessarily show that the joinder of the presumptive reversioner is not warranted by this rule. It cannot be rightly said that the question of the operativeness of the mortgage as against the estate is not involved in a suit wherein the mortgagee seeks to bring the whole property and not merely the limited interest of the widow to sale. Whether the joinder of the presumptive reversioner will (within the meaning of O. 1 r. 10 (2)) enable the

Court, effectually and completely to adjudicate upon and settle the matter will depend upon the answer to the other two questions indicated at the outset of this article.

It is however desirable to point out here that the bringing in of the reversioner or the raising of an issue as to the binding character of the mortgage will not violate the rule against joining persons claiming by 'title paramount' as against the mortgagor. It may in a sense be true that the reversioner does not claim 'through' the widow, but the decree obtained against the widow can in certain circumstances effectually bind him. The omission of the widow to pay up the decree amount may (if the debt was a proper one) lead to the extinction of the reversioner's rights on the execution sale taking place. The reversioner's position is in this respect more analogous to that of a remainder-man (with regard to a mortgage made by the prior full owner) or that of a son in a Mitakshara joint family (with regard to a mortgage of family property made by the father); the difference arising from the absence of a 'vested interest in the reversioner is immaterial for this purpose. Just as the Hindu son is made a party to the mortgagee's suit against the father, so as to give the son an opportunity of disproving the binding character of the debt, it is eminently desirable to allow the question of the binding character of the mortgage by the widow to be settled in the mortgage suit itself instead of being postponed to a later litigation. In *Indar Kuar* v. *Lalta Prasad* [1] the daughter was during the mother's lifetime allowed, in the mortgage suit itself, to plead and prove that only the mother's limited interest could be sold on foot of the mortgage, as the debt had not been borrowed for a purpose binding on the estate.

We may now proceed to the next question. Suppose the presumptive reversioner is impleaded in the mortgagee's suit, is he *bound* to plead on the question of the binding character of the widow's mortgage. It is submitted that on the principle laid down in cases like *Sri Gopal* v. *Prithi Singh* [2] he is bound to do so, on pain of being precluded from ever afterwards raising the question himself when he becomes the actual reversioner. The doubt suggested as to this in *Bhagirathi Das's Case* [3] seems to us, with all respect, unfounded. The following passage in Jones on

1. (1882) I. L. R. 4 A 532. 2. (1902) I. L. R. 24 A. 429 (P. C.)
3. (1913) I. L. R. 41 C. 69.

Mortgages (S. 1439) is apposite in this connection:—" Where the complainant states such facts as will if admitted subject the defendant's title to the plaintiff's mortgage and to the relief sought, the defendant may be estopped from afterwards setting up his interest as against the judgment in the foreclosure action. The judgment rendered is conclusive between the same parties and their privies, upon all matters embraced within the issue in the action, whether the issue was joined by the defendant or left unanswered. Thus, in a suit upon a mortgage made by a life tenant but purporting to convey the fee certain contingent remaindermen were made parties, the complainant alleging that their interest was inferior to the mortgage, and a decree was rendered against them by default. It was held that the decree barred their interest and gave the purchaser at the foreclosure sale a good title." The decision in *Kanai Lall Khan* v. *Sashi Bhusan Biswas* [1], is distinguishable on the ground that in that case the reversioner was brought into the mortgagee's suit only as 'legal representative' of the widow, on her death pending suit and the Court accordingly refused to allow him to raise the question of 'necessity,' which was a new plea not open to the widow herself.

If the reversioner pleads and the question of necessity is decided, one way or the other, there can be no doubt that the question cannot afterwards be raised once again, if he himself becomes the actual reversioner. (Cf. S. 43 of the Specific Relief Act) see also *Beardsley* v. *Beardsley* [2]. The rule of *res judicata* would be the same whether the presumptive reversioner figured as plaintiff in the former suit or as defendant. But if some one else turns out to be the 'actual' reversioner after the widow's death, the question of the effect of the presumptive reversioner's omission to plead in the mortgagee's suit or of the operation of the adjudication on the question of necessity in that suit, presents some difficulty. It seems however clear that even in respect of this question there is no reason for making any distinction between cases in which the presumptive reversioner has come forward as a plaintiff and those in which he has been impleaded as a defendant. He may be fairly deemed to fill a representative capacity Cf. *Venkatanarayana Pillai* v. *Subbammal* [3] as much in the one case as in the other; and if the decision of the Judicial Commitee in the last cited case is to

1. (1881) I. L. R. 6 C. 777. 2. (1899) L. R. I. Q. B. 746.
3. (1915) I. L. R. 38 M. 406 (P. C.)

be interpreted as giving support to the application of the rule of *res jud'cata* in favour of the 'actual' reversioner (though he was not the plaintiff in the former suit), the rule will equally apply *against* the reversioner in similar circumstances, at least in cases in which the adjudication was obtained *after fair contest.* But we do not think that even this construction of that decision will justify the extension of the rule of 'constructive *res judicata*', as laid down in *Sri Gopal* v. *Prithi Singh* 1 to such cases, so as to bind the actual reversioner by the *default* or *omission* of the presumptive reversioner impleaded in the former suit.

SUMMARY OF ENGLISH CASES.

In re **Mariette. Mariette** *v.* **Governing Body of Aldenham School,** (1915) 2 Ch. 284.

Charity—Bequest to governors of a school for building Fives courts in the school—Bequest for prizes in athletics—Statute of Elizabeth 43 Eliz. C. 4.

A testator bequeathed to the Governor of a school a sum of £ 1,000 for building Fives courts or squash racket courts or for some similar purpose to be determined upon by the Governors. He also bequeathed a sum of £ 100 to the headmaster of the school for the time being, so that the interest on the sum might be used for giving prizes in athletics. The school was founded as a free grammer school and was a charity within the statute of Elizabeth. *Held,* that both the legacies were valid charitable bequests, it being essential in a school of learning that there should be organised games as part of the daily routine.

In re **Croxton. Ferrers** v. **Croxton,** (1915) 2 Ch. 291.

Will—Annuity—Charge on Realty and Personality—Insufficiency of income—Deficiency paid out of corpus—Recoupment —Tenant for life and remainder man, liability of.

A testator bequeathed annuities charged upon the income and corpus of his residuary estate. The whole of the estate was settled in strict settlement upon his son and grandson. The income was insufficient to keep down the annuities. About £52 had been paid out of the capital, to satisfy an annuitant who had died in 1911 and also the surviving annuitants. It was

1. (1902) I. L. R. 24 A 429.

expected that there would be surplus income in the hands of the tenant for life after satisfying the annuities.

Held, the tenant for life could not be called upon to replace the deficiency raised out of the capital, having regard to the fact that the annuities were charged upon the capital as well as income. *Prince* v. *Cooper* [1] followed.

In re **Stoodley Hooson** *v.* **Locock**, (1915) 2 Ch. 295.

Will—Construction—Codicil, effect of—Residuary bequest in will—Bequest in codicil of "the residue of my estate not bequeathed by the will"—Effect of.

A clear and unambiguous gift in a will can be revoked by codicil only by words equally clear and unambiguous as those of the original gift.

Hearle v. *Hicks* [2].

A testator by his will made certain specific bequests and devised certain lands for charitable purposes, and thereafter devised and bequethed all his real and personal estate, not disposed of, to his trustees to hold in trust for certain religious and charitable purposes. Later on, the testator made a codicil in which after referring to his will, continued, "The residue of my estate not bequeathed by the above will I give and bequeath to Mabel... absolutely, and I appoint her sole executrix of this codicil." The testator died soon after. *Held*, that what passed under the bequest in the codicil was such portion (if any) of the residue as might ultimately turn out not to have been effectually disposed of by the will and no more.

In re **Cadbury Brothers' Application**, (1915) 2 Ch. 307.

Trade mark—Label—Registration—Name of a distinctive character—Disclaimer—Trade Marks Act, 1905 (5 Edn. 7 c. 15) Ss. 3, 9 and 15.

An application was made by Cadbury Brothers, Ltd., to the registrar of trade marks, to register as a trade-mark a label consisting of a wreath or border of five Tudor roses enclosing the words "Tudor chocolates made by Cadbury," the word "Tudor," being in the most prominent type. There was evidence to show that for 12 or 13 years, the word 'Tudor' had been distinctively used with reference to the goods of the applicants. The registrar in accordance with a recent practice refused to register except on

1. (1853) 17 Beav. 187. 2. (1832) 1 Cl. and F. 20, foll.

the condition of the applicants disclaiming any right to the exclusive use of the word "Tudor."

Held, that the registrar was wrong in acting on a supposed rule of practice and the registration in the present case ought to proceed without insisting on any disclaimer.

The discretion conferred on the registrar or the Court by S. 15 of the Trade Marks Act, 1905, to a require a disclaimer of any right to the exclusive use of any part or parts of a trade-mark should not be exercised so as to place upon the register disclaimers which are unnecessary in law.

In re **Ruben**, (1915) 2 Ch. 313.

Alien Enemy—Life assurance policy—Deposit with enemy as security—Policies out of jurisdiction—Enemy property—Application to vest policies in custodian—Trading with the Enemy Amendment Act (1914), (5 Geo. 5 C. 12) S. 4 (1).

An English firm of two partners had deposited with one Ruben, an alien enemy resident in Germany certain policies of assurance on the respective lives of the partners, as security for certain bills which Ruben had accepted on behalf of the firm. The firm became bankrupt later on. One of the partners died and the policy became payable. The trustee in the bankruptcy applied, under S. 4 of the Trading with the Enemy Amendment Act, 1914, for an order vesting in the custodian, the two policies or in the alternative, the right to receive the moneys thereunder. *Held*, that the only property which could be vested in the custodian under the Act, was enemy property. The charge on the policy was enemy property, but the applicant was not interested in it. The application was therefore dismissed.

Duncan Fox and Company, *v.* **Schrempet**, (1915) 3 K. B. 355.

Sale of goods C. I. F. contract—Performance of, impossible owing to war and illegal being against proclamation—Effect on rights of parties.

An English firm sold to another firm a quantity of Chilian honey to be delivered at Hamburg in Germany, payment to be made at Liverpool in exchange for shipping documents on presentation. The honey was shipped on board a German steamer and while on high seas, war was declared between England and Germany and the Proclamation against the trading with enemy

was issued. On the same day the bill of lading was tendered to the buyers who refused to accept the same.

Held, that they were entitled to do so as the further performance of the contract by either parties would have involved illegal acts.

Fratelli Sorrentimo *v*. Buerger, (1915) 3 K. B. 367.

Charterparty Shipping—Effect of sale of ship before date fixed for loading.

Certain ship-owners agreed that their ship should proceed to a certain place and there load a complete cargo. Before the ship reached the place, they sold the ship with the benefit of the contract for loading.

Held, that the sale did not excuse the charterer from loading the vessel according to contract and on the finding that the original owners and the purchasers were always willing to perform the contract and did in fact tender the ship for loading at the place.

Held, that the original owners had not put it out of their power to perform the contract.

JOTTINGS AND CUTTINGS.

Professional Ethics.—Ought a lawyer to defend a prisoner whom he believes to be guilty? Mr. Justice Darling in a case in which a solicitor was the plaintiff made some observations on the familiar problem which ought not to be unrecorded. He protested, says the "London Globe" against the notion that a lawyer, whether barrister or solicitor, is under an obligation to cease to conduct a case which he realises to be bad. "If an advocate in the course of a trial for murder comes to recognise that his client is guilty, is he" asked the learned Judge, "to say to the court, "Hang my client?" To lawyers this counter-query with its self-evident response effectually places beyond the realm of argument the original question. They know that when once embarked on a case they cannot retire therefrom without the consent of the client or the court, and to come before the latter with a revelation of facts damaging to the person they have chosen to defend in such a breach of confidence that no lawyer worthy of the name could be found to commit it. Moreover, even if a lawyer were himself willing to commit such perfidy, the law itself, having

regard to the sacredness of the relation subsisting between attorney and client, would from motives of public policy effectually seal his lips. But how about a lawyer accepting a retainer and voluntarily engaging in the defence of an accused person where he has, prior to his retention, direct knowledge of the prisoner's guilt, derived, we will say, from the accused's own confession? Is not such a defence highly unethical and evidence of a professional depravity in the lawyer who will dare to undertake it, the pseudo-moralist asks? And Lord Macaulay in his glittering style inquires, "Can it be right that a man should, with a wig on his head and band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire?" To this rhetorical question we answer simply, "It can." The public hangman or chief electrocutioner can by virtue of his office and under warrant from the state legally and morally deprive of his life at the appointed time a murderer condemned to die; but let any one before such time seek to accomplish his death by lynch law or otherwise, and it is the duty of the Sheriff or other proper custodian to defend him to the utmost, even to the point of taking life, although the prisoner may be rightly deserving of death. His death, however, the law and good morals say, should be accomplished only by due process of law. The trouble with most detractors of the legal profession is that they fail utterly to comprehend the principle on which advocacy is based. Advocacy implies nothing more than the substitution for an actual litigant of a person professing special skill and learning in litigation to do on behalf of the litigant and in his stead all that he, if possessing sufficient knowledge and ability, might do for himself with fairness to his opponent. Every man, accused of an offence, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless on legal evidence, and with all the forms which have been devised for the security of life and liberty. As former Chief Justice Sharswood of Pennsylvania has wisely said: "These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence." To conduct his defence in accordance with the forms of law, a prisoner, no matter how guilty, is entitled to the benefit of counsel and force the latter to act under pain of punishment for contempt if he fails to discharge his duties properly. It can therefore

not be improper or unethical for an attorney to do what the law can oblige him to do, and this principle is embodied in the codes of professional ethics adopted by many states which provide that "an attorney cannot reject [or is not bound to reject] the defence of a person accused of a criminal offence because he knows or believes him guilty. It is his duty by all fair and honourable (or lawful) means to present such defence as the law of the land permits to the end that no one may be deprived of life or liberty, but by due process of law."—*Law Notes.*

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New application of Majority rule:—

"What's the charge"? asked the magistrate.

"He stole my pig, your honour" said the plaintiff.

"Have you any witnesses?" asked the magistrate.

The plaintiff produced three men, who swore that they saw the defendant steal the pig.

"But I have 10 witnesses who didn't see me steal the pig," announced the defendant.

"His honour counted busily."

"That's right," he said when he had compared the number of witnesses on the two sides.

"In this country majority rules," he announced.

"The prisoner is discharged." *Law Students Helper.*

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Humor of the Law.—The secretary of the bar association was very busy and rather cross. The telephone rang.

"Well, what is it?" he snapped.

"Is that the city gas works?" said a woman's soft voice.

"No, madame," roared the secretary, "this is the San Francisco Bar Association."

"Ah," she answered in the sweetest of tones, "I didn't miss it so far, after all did I?"—*Central Law Journal, Vol. 81, No. 13.*

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Matrimony in Jewish Law.—The first article of the Eben Hazer (*i.e.*, the Rock of Salvation) an authoritative code of Jewish Law declares: "Marriage is for man a religious and social obligation; he who does not marry is considered quilty of homicide."

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Death of two retired Judges.—The careers of Sir George Farwell and Sir Thomas Bucknill, which, to the sincere sorrow of the whole profession, have ended within the last few days, were,

in some respects, strangely parallel. Both w[illegible]orn in 1845; both reached the Bench in 1899. Apart from [illegible] coincidences, however, there was little of resemblance abou[illegible]m. Sir George Farwell was one of the strongest and most l[illegible] judges of our time. His judgments were expressed in virile a[illegible]eful English, and some of them, particularly that he deliver[illegible] in the *Taff Vale Case*, were notable contributions to legal history. To his fine judicial temper he joined a rare independence of judgment, which found fitting expression in the protests he made more than once in the Court of Appeal against the encroachments of the executive upon the province of the Courts. Sir Thomas Bucknill was a judge of a different type. Not by any special gift of legal scholarship did he win the high regard in which he was held; it was by the less conspicuous but not less important gifts he displayed as a *nisi prius* judge—his keen sense of fairness, his painstaking industry, and his breeziness of temperament—that he achieved the the wide popularity he enjoyed. There was always something of the country squire about him, but nothing of his narrowness. Everybody will regret that Sir George Farwell and Sir Thomas Bucknill, after a long record of judicial service faithfully given, did not live longer to enjoy the leisure they had so well earned. —*Law Journal, October 9.*

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Macaulay and the Law.—Macaulay, who was a member of the Northern Circuit, had, like so many other members of the Bar who have abandoned the profession to win renown in other spheres a strong dislike for the law, though he overcame it somewhat when he went to India as legal member of the Viceroy's Council. 'Nothing is more characteristic of the man,' writes his biographer, 'than the contrast between his unconquerable aversion to the science of jurisprudence at the time when he was ostensibly preparing himself to be an advocate, and the zest with which, on his voyage to India, he mastered that science in principle and detail as soon as his imagination was fired by the prospect of the responsibilities of a law-giver'. It was while Macaulay was seeking in vain for clients on the Northern Circuit, not long after his call to the Bar in 1826, that he penned the newly discovered Latin verses which have been published in the *Times*. They show how the young barrister, bored by circuit life, turns lovingly to Cambridge. He describes—to quote the translation supplied by the President of Magdalen College, Oxford—how 'the Court's

loud murmu[redacted]s,' and how the 'crowding clients' chatter blares,' but th[redacted]mony and conflicts of forensic life have no attraction for [redacted]

> But[redacted]e Bar's persuasive tone,
> Nor[redacted] of javelin'd satellite,
> Nor judge who stares at shoulders white
> With snowy tresses not their own,

can keep his thoughts from turning to his old Cambridge rooms. Macaulay, indeed, never took seriously to the Bar as a profession. 'After the first year or two of the period during which he called himself a barrister' writes Sir George Trevelyan, 'he gave up even the pretence of reading law, and spent many more hours under the gallery of the House of Commons than in all Courts together. Probably, if Macaulay had chosen to apply himself more diligently and patiently to the profession he might have won a great name in it. 'It was not hard,' he writes of Bacon, 'for a man of his powers to acquire that very moderate portion of technical knowledge which, when joined to quickness, tact, wit, ingenuity, eloquence, and knowledge of the world, is sufficient to raise an advocate to the highest professional eminence.' Possibly a personal note may be detected in the sentence in his famous essay; but the world, including the Bar, has good reason to be glad that the essayist and historian was not lost in the advocate or judge.—*Ibid October 16.*

* * *

Miscellany.—Not long after Sir Thomas Bucknill was made a judge he had before him, at the Derby Assizes, a young girl charged with murdering her infant by throwing it down the shaft of a disused lead mine. She was acquitted of the capital charge, but for concealing the death of the child was sentenced to three months' imprisonment without hard labour. Her sad case appealed to his sympathetic nature, and before leaving Derby he wrote to the girl's father:—'Assize Court, Derby, February 28, 1899. Sir,—I am the judge who sentenced your daughter, Emily Gilbert, on Saturday to three months' imprisonment for the concealment of birth of her recently born child, and I have been to the gaol to-day to see her and talk to her, and I have told her that I am writing to you. She seemed very sorry for the past, and I want you to tell me that when she comes out of prison you and her mother will forgive her and take her back, and try to help her to make a new start. I know how angry you must have felt with her, but

at the time it would be a very great delight to me to know from you that you and her mother will overlook the past, and will not be any longer angry with her, so that she may be encouraged to make a new beginning by your help.—I am, yours faithfully, T. T. Bucknill.' No judge could have written just like that who had not the double gift of sound sense and a kindly heart.—*Ibid.*

A Legal V. C.—The profession will have heard with special sorrow of the death of Lance-Corporal Keywoth. V. C., who was a clerk in the employ of Messrs. Burton, Scorers & White, of Lincoln, when he joined the King's Forces at the beginning of the war. He was awarded the Victoria Cross for his conspicuous bravery at Givenchy in May, and has now died of wounds received in action in France. He is the only soldier associated with the legal profession who has won the V. C., and every lawyer in the country, proud of the distinction he achieved, will sincerely regret the death of so young and gallant a comrade.—*Ibid October 23.*

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Miscellany.—Lord Reading was entertained at a banquet given by the New York Bar Association on October 14. He received an ovation from the gathering, which included all the prominent lawyers in the State of New York. Lord Reading, in the course of his speech, said that the duty of the law was to secure justice. 'The idea that it is the duty of the law courts to dispense law is becoming obsolete,' he is reported to have said. 'It is recognised that the true duty of the courts is to dispense justice. I have been much impressed by the undesirability of recording decisions that do not involve new principles, but only apply old principles to new facts.'—

His Honour Judge Atherley-Jones, K.C., M. P., in addressing, as Recorder of Newcastle, the Grand Jury at the Michaelmas Quarter Sessions, expressed his pleasure at the appointment of the Town Clerk as Clerk of the Peace, and remarked that he understood that the duties of Public Prosecutor, which had hitherto been discharged by the Clerk of the Peace, would now be discharged by another gentleman. It would be wrong and inconsistent with the principles of the administration of justice that a person who was directly associated with the prosecution of criminals should share in any degree in the discharge of the judicial duties connected with the trial of those prisoners. It was a great mistake, although it was a very common one, for those associated in the administration of the law to speak in terms of

highest praise of the integrity of the Judicial Bench. The integrity was not due to the fact that they who performed those duties had a double dose of original righteousness, but it was really due to the excellence of our system and the vigilance with which the discharge of justice was scrutinised and supervised by the public and by the Press. In the days before that scrutiny and supervision were exercised, the greatest abuses were associated with the discharge of the duties of the Judicial Bench. In these days of stress and storm there was no question that they who were concerned with the administration of justice should take the uttermost care that the liberty of the subject should not be rashly or wantonly interfered with by the executive. Owing to the present condition of affairs, and inevitably in some cases, there had been some confusion between the discharge of judicial and executive duties. He for one entertained no fear that any injury was likely to ensue to the country by our maintaining inviolable the principles of British justice—fair and open trial.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

"The cunning livery" is the heading of an article of interest in the *American Law Review* for September-October, in which the history of the exceptions engrafted on the doctrine of *caveat emptor* is dealt with. The writer shows how in the beginning there was an action only if there was a lie warranted but how gradually an action came to be recognised for all lies and how finally an action is now maintainable on any affirmation provided a contract is intended. It may be an indication of the growing degeneracy of the times or it may be an indication of greater truthfulness and trustfulness. In assessing damages, for breach of warranty, American Courts seem to be divided into two schools. One school allows only the amount of loss, that is to say the difference between the price paid and the actual value of the goods sold while the other school allows the difference between the actual value and the value that the goods would have realised if the affirmation was made good.

In another article, the extent to which the pardoning power is vested in the executive, the legislature and the judiciary in the United States of America is discussed. The power vested in the King in England is vested in America in the Presidents and the Governors though properly speaking, it must vest in the people. Properly speaking "pardon" is neither a legislative, nor a judicial but an exe-

cutive function. But the legislatures have undoubtedly power to pardon not only individuals, but also issue general pardons, though the federal legislature as a legislature of limited powers may not possess that power. As instances of the judiciary power of pardon are given power to stay execution of sentence temporarily pending appeal for instance, indefinitely as when the Court finds the verdict unsatisfactory. There is a conflict of opinion in America as to the constitutionality of the exercise of this power. The indefinite suspension of sentence is another way in which the judiciary exercises the power. This power is more largely recognised in America than the power of staying execution indefinitely. Certain statutes have conferred upon the Courts, power to suspend or remit sentence on good behaviour. Courts are also recognised to possess the power to remit fines, etc., in cases of contempt of Court. Prison authorities are also given certain powers under statutes to discharge prisoners on good behaviour.

Lawyers have always dominated American political life—to give one instance, 22 out of the twenty-seven presidents of the United States of America have been lawyers. The writer of the article headed "lawyer and democracy" regrets that the lawyers are not keeping pace with the times and instead of being on the side of progress, are too much attached to the past and wholly unable to throw themselves into the future. He traces this defect to the lawyer's method of the study of case law. The lawyer is unable, he says, to reconcile himself with the recognition of the rights of the State against private property. He exhorts lawyers to take their inspiration from the great lawyers who signed the Declaration of Independence.

Mr. Norman Bentwich discusses the extent to which recognitionis given to Jewish Law in private international jurisprudence. It varies from the complete adoption of it in the orient to govern all the personal relations of native Jews to the bare admission of it in France as a system chosen by certain foreign countries to regulate the conditions of marriage in Europe. In England, Jewish law is recognised to the extent that Jewish form of marriage is an accepted form of marriage for Jews, but the capacity of the parties to the marriage is to be wholly determined by reference to English Law. Russia and Austria entrust the question of personal status largely to the Rabbis and recognise their decrees of divorce while England does not recognise any system of divorce other than that

allowed by the Act of 1857. This works a hardship on Jews domiciled and married in Russia or Austria and since settled in England, the grounds on which divorce is allowed under the Rabbinical law being much wider than those under the English Law of divorce.

Though choses in action have properly speaking no locality, for certain limited purposes they are treated as having a locality. A writer in the *Canadian Law Times* for September, deals with this question at some length. The *locality* may vary according to the purpose for which it is sought to be determined. It may have one locality for enforcing or administering it, or another to determine rights of succession and quite a third one for purposes of income-tax. The case of *specialty* debts seems to stand under the English Law on a special footing, the specialty being supposed to be wherever the bond is to be found.

Another writer in the same journal considers the question whether in an action on contract, damages for injured feelings, indignities, etc., can be had. He thinks on the authority of *Addis* v. *Gramophone Company* [1] that under the English law it cannot; though in a recent case in New York in which an action was brought against the Cunard Company by a lady passenger on board a steamer of the company for damages for indignities suffered by her at the hands of the examining ship's doctor, the Court held that the only question in such cases was whether the damages were too remote and they held that in that particular case, it could not be held too remote. The writer controverts this position and argues that the ground on which English law generally disallows damages for injured feelings is not *remoteness* of the damage but the impossibility of valuing the damage in terms of money.

We welcome the new Journal, "The Legal Miscellany and Review" from Calcutta. "Are laws judicially noticed." "Fraud, its effect on contracts and judicial proceedings." "Crime and criminal law—a comparative study" are some of the interesting articles in the issue of this Journal for September.

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1. L. R. (1909) A. C. 488.

The Madras Law Journal.

PART XXIII.] DECEMBER 1915. VOL. XXIX.

SUMMARY OF ENGLISH CASES.

Watney Combe, Reid and Company v. Berners: (1915) A. C. 885.

Statute—Construction—Intention of legislature—To be inferred from language used—Consideration of consequences unsafe—Finance Act 1912 Sec. 2.

Per Viscount Haldane, L.C.—The intention (of the legislature) must be found in the language finally adopted in the statutes under construction and in that language alone. No doubt general words may in certain cases properly be interpreted as having a meaning or scope other than literal or usual meaning. They may be so interpreted where the scheme appearing from the language of the legislature, read in its entirety points to consistency as requiring the modification of what would be the meaning apart from any context or apart from the purpose of legislation as appearing from the words which the legislature had used or apart from the general law.

Per Lord Parmoor.—The consideration of consequences is an unsafe interpreter of a statutory enactment. There is no case in which it is more important to remember this caution than in the interpretation of a section in a taxing act, expressed in general terms, applicable to a large number of varying business arrangements. The Court has seldom sufficient information to know accurately to what extent the suggested anomalies occur in practice or what weight should be attached to selected instances.

Their Lordships accordingly declined to accept the construction put upon a section of the Finance Act by the Court of Appeal on its view as to the intention of the legislature. The section provided that "where the licensed premises are held under a lease made before the Act, which does not contain any covenant by the lessee to obtain a supply of the intoxicating liquor from the grantor, the lessee shall be entitled to recover a portion of the increase in duty from the grantor." The question before the House was whether a mesne lessee who was not the person in occupation or the holder of a license (his sub-lessee being the holder

of the license and in occupation of the premises) was entitled to the benefit of this provision. The Court of Appeal held that the legislature intended to benefit only the licensee in possession who had to bear the additional burden.

Eastwood v. **Ashton**: (1915) A. C. 900.

Vendor and *purchaser—Conveyance—Plan*—Falsa demonstratio—*Implied covenants of title—Bar by limitation—If within.*

Where there are several descriptions in a deed which when evidence of surrounding facts is admitted, are not consistent one with the other, there is no general rule by which the Court can decide which description ought to prevail. But *ceteris paribus* the more detailed and precise the description the more likely it is to accord with the real intention of the parties. The maxim *falsa demonstratio non nocet* is useless unless and until the Court has made up its mind as to which of two or more conflicting descriptions ought under the circumstances, to be considered the true description. The order in which the conflicting descriptions occur is not at all conclusive.

In a sale-deed there were various descriptions such as acreage, name of the farm, of the occupant none of them being however wholly accurate on any hypothesis but there was a recital in the document that the premises were more particularly described in the plan attached. *Held* that the description given in the plan should prevail.

Adverse possession for over the statutory period by a stranger is a defect of title for which the vendor is liable for breach of the implied covenant for title under S. 7 Cl. 1 (A) of the Conveyancing Act.

Pate *v.* **Pate**, (1915) A. C. 1100.

Ceylon Ordinance—Partnership—Writing—Requirement of—Stare decisis.

Under a Ceylon Ordinance "no promise contract, bargain or agreement, unless it be in writing and signed by the party making the same, etc., shall be of force for establishing a partnership where the capital exceeds 100 £. provided that this shall not be construed to prevent third parties from suing partners, etc." Plaintiff in the case alleged that there was such a partnership which carried on business for some time when it was dissolved, that the defendant was in possession of assets notwithstanding the

dissolution and claimed account, etc. The Ceylon Courts held that in such a case, the ordinance did not apply. There was a course of decisions to that effect. Their Lordships held that the Ceylon decisions were wrong and that the plaintiff could not prove the partnership.

To the argument of *stare decisis*, their Lordships answer "Their Lordships think not only that their decision was erroneous but also that even after the interval of 44 years it ought to be overruled. The present is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb. There can be few partnerships in Ceylon, still in operation or unliquidated in which writing has been dispensed with on the faith of these decisions. If parties choose to disregard so ordinary and simple a formality as the ordinance requires, there is no hardship in learning them to take the consequences nor is it in any case sound to misconstrue a statute for fear that in particular instances, some hardship may result. That is a matter for the legislature, not for the Courts." Their Lordships add "whenever the law enacts that the truth shall be proved by one form of testimony only and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription the policy of which was the prevention of fraud. This the legislature must be taken to have weighed before enacting the ordinance. All that remains for judicial determination is its true meaning."

Fred Wilkins and Brothers *v.* Weaver, (1915) 2 Ch. 322.

Contract of service—Master and servant—Breach of contract—Employment by subsequent master with notice—Damages.

Where an employee, who had entered into a contract of service for a fixed term with his master, engaging to devote himself solely in the master's business and not in any way to be connected with any other business without the consent of the master with a prohibition against disclosing trade secrets and confidential information, in breach of the contract enters the service of another who was given notice of the contract by the former master, the person who engages him later is liable to the former master if he keeps the employee in service after notice of the former contract which the employee had broken.

In re **Lind Industrials Finance Syndicate** *v.* **Lind,** (1915) 2 Ch. 345. (C. A.)

Mortgage—Expectant share of next of kin of living person—Bankruptcy and discharge before falling into possession—Effect on mortgage.

Where a person who is the presumptive next of kin of a living person mortgages his expectant share and subsequently is adjudicated a bankrupt and discharged in bankruptcy and the mortgagee does not prove in bankruptcy, the adjudication and discharge do not extinguish the mortgage; and a person who takes an assignment of the expectant share subsequent to the discharge does not take the property when it falls in possession free from the mortgage.

A mortgage of an expectant share does not merely create a contractual obligation which is extinguished by the discharge in bankruptcy of the mortgagor, but creates an interest in the property in equity when it falls in possession and as such is not extinguished by the bankruptcy and discharge.

H. Blacklock and Co., Limited *v.* **C. Arthur Pearson, Limited,** (1915) 2 Ch. 376.

Copyright—Index to Railway stations in Bradshaw's Guide—Infringement—Monthly publication—Latest publication whether a new edition of an earlier publication whose copyright has expired—Copyright Act, 1911 Ss. 1, 2, 7, 35.

The plaintiffs are the publishers and owners of the copyright in Bradshaw's General Railway and Steam Navigation Guide, a monthly publication with a complete index of Railway stations in Great Britain and Ireland. The defendants for their purpose copied some portions of the index to Bradshaw's Guide, of the publications for years for which if the plaintiffs had a copyright had not expired by efflux of time. In an action by the plaintiffs for the infringements of copyright with regard to portions of the index.

Held (1) Under the Copyright Act 1911, copyright subsists in every original "literary work" which term includes compilations; the list of names contained in the index to Bradshaw is entitled to copyright as much as any other part of the publication.

(2) The index to the publication of January 1914 is not merely a new edition within the meaning of the copyright law, of

the publication for a year whose copyright has expired. The Bradshaw of the month is a new work. A book which consists of a specification of the conditions at the present moment of a constantly changing subject matter is a new work even though some of the particulars given may not have altered from what they were stated to be years before.

Becker, Gray and Co. *v.* London Assurance Corporation, (1915) 3 K. B. 410.

Marine Insurance—Policy—Construction—Peril of capture —What constitutes—Attempt to avoid capture—Loss of venture —Liability for.

In an action against underwriters on goods under a policy on a voyage from Calcutta to Hamburg in a German Steamer, the question arose whether the goods were lost by any of the perils mentioned in the policy and in particular whether they were lost owing to men-of-war. The policy was against the usual perils including men-of-war, enemies, takings at sea, and restraint of princes. The facts found were that, while the goods were at sea war broke out between Great Britain and Germany and that, on being informed of that fact, the master put into a neutral port in order to avoid the risk of capture by hostile cruisers and with the intention of suspending the prosecution of the voyage until after the termination of the war. It was also found that there was no chasing of the ship by a hostile man-of-war, that no such man-of war was sighted by it, that the ship was not driven into the neutral port by the intelligence of a particular man-of-war being in the neighbourhood, and that the master went into that port because he feared that if he prosecutes his voyage the ship would be captured. *Held*, that the goods were not lost by a peril insured against.

Although to constitute a loss by capture a *de facto* capture is not absolutely necessary, an attempt to avoid capture is not the same as a loss by capture. The peril must have begun to operate or must operate directly and not circuitously.

Rex *v.* Judge Radcliffe, Oxfordshire County Council Ex Parte. (1915) 3 K. B. 418.

Words—"Without visible means of support"—Meaning—Mental Deficiency Act, 1913 (3 and 4 Geo. 5 C. 28), Ss. 1, 2, 6.

Where the question arose as to whether a "defective" was "without visible means of support" within the meaning of the section of a statute which ran as follows "a person who is a defective may be dealt with under this Act . . if in addition to being a defective he is a person who is found neglected, abandoned, or *without visible means of support*, or cruelly treated," *held* that the words were applicable to cases where the defective was in fact not being maintained or taken care of, or, where, at all events, those who had taken care of him were turning him adrift or threatening to do so and that they did not apply to the case of a defective who was in a comfortable home and was being properly taken care of, although he might have no property and those maintaining him might be under no obligation to do so.

JOTTINGS AND CUTTINGS.

New Career for Women.—A new career for women is suggested by Mr. Hubert Hall, Assistant Keeper of the Public Records. In his opinion there is a great opening during the war for the employment of women as archivists. Certain operations of the archivist could be more neatly and effectively performed by women than by men, and he hoped to see at least one woman in every office for the preservation of public records.

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In Burton's "Book Hunter"—an old friend of all who love to potter in regions bibliographic—is a note which has always delighted us. "A late venerable practitioner in a humble department of the law," says the author, "who wanted to write a book, and was recommended to try his hand at a translation of Latin law maxims as a thing much wanted, was considerably puzzled by the maxim, *Catella realis non potest legari*; nor was he quite relieved when he turned up his Ainsworth and found that '*catella*' means a 'little puppy.' There was nothing for it, however, but obedience, so that he had to give currency to the remarkable principle of law that 'a genuine little whelp cannot be left in legacy.' He also translated *Messis sequitur sementem*, with a fine simplicity, into 'Harvest follows the seedtime'; and *Actor sequitur forum rei* he made 'The agent must be in court when the case is going on.' Copies of the book containing these gems are exceedingly rare, some malicious person having put the author up to

their absurdity." Burton does not disclose the name of the "late venerable practitioner" from whose work he quotes, and "we in dreams behold the Hebrides" and in our slumber fancy we have found a copy of this rarity in the fourpenny box. In our waking hours, however, no such success has attended our explorations, and we had regretfully come to the conclusion that, like some other good things, the volume was mythical—that, as the lady said, who must have been related to the "late venerable practitioner," the book existed only "in nudibus."

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But a writer in the *Law Times* has discovered that in naked truth the volume does exist. He has discovered that the author in question was one Peter Halkerston, a Scottish lawyer, who brought out his collection of maxims in 1823. He remarks in his preface that "With regard to the translation it does not become me to say much. I trust, however, that on the whole it will be found pretty correct"! How correct may partially be gauged by the examples cited by Burton, who, however, does not cite the first one accurately; the maxim as given by Halkerston being *Catella juste possessa amitti non possunt*, which is delightfully translated thus: "A little whelp (perhaps cattle) lawfully possessed cannot be lost"! Many other instances of Halkerston's translations are equally funny. Here are a few: *Dolus versatur in generalibus*, which is rendered, "Craft is inconsistent in general": *Rexest mixta persona* becomes "The King is a mixed character"; *Communis error facit jus* is turned into 'A common error makes law necessary.' A treasure to the connoisseur of legal literature.

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A Chinese Witness.—Examination on the *voir dire* is always apt to prove amusing. We take the following investigation of the competence of a Chinese witness from an American contemporary:—"Well, sir," said the advocate, "explain to the Court the nature of an oath." "Suppose me tella lie," replied See Yup, "when I go die make, me a heap of tubble, and before that I catch plenty tlubble here for Melican judge send me Stlates plison." "Humph," said the advocate, "suppose you tell the truth, what then?" "Suppose I tella tluth, Melican judge send your client Whisky Jim to Stlates plison." "The witness," said the judge blandly, "is clearly qualified. Let him be sworn."

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A dangerous author Kipling! His famous line, "The captains and the kings depart," was lately censored in this country (because no kings were present on the occasion referred to in the despatch); and now the wife of a gunner in the U.S.A. navy is suing for a separation because he sent her a marked copy of Kipling's "Vampire." The implication contained in the sending of Kipling's volume to her is in her view the quintessence of cruelty. "A rag and a bone and a hank of hair" is the not too flattering description of the lady in that poem if we recollect aright, and we have seen innuendoes constructed from less promising material. As a basis for a separation decree the material in this country at any rate is rather thin, since in *Russell* v. *Russell* (1897) A. C. 395, the House of Lords accepted the argument of learned counsel to the effect that "mere insult not of an aggravated character must be treated as being an incident of matrimony" and is not legally cruel.

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The Authority of the Schoolmaster. –A striking instance of the supposed conflict between Law and Justice, or rather between what may be regarded as settled principles governing the relations of persons under the law as recognised by the Courts and the fluctuating opinions of people outside, is afforded by the action by a schoolboy against his master to recover damages for a caning, which was tried in the King's Bench last week (*Nunn* v. *Selwyn*; October 20, 21) The boy was given leave of absence for a day to see his brother, who was going away on military service, but this was on the express promise that he would return that night. He did not return till the following evening, having been sent by his father to a place in the country where the brother was staying, and when he got back to school he was submitted for his breach of the regulations and of his undertaking to a 'ceremonial' caning by the headmaster, for which he now claimed, what he described in his diary as his 'vengeance.' There was no suggestion of indirect motive or want of *bona fides* in the exercise of his judgment, on the part of the headmaster, nor was there any complaint of excess in the degree of punishment—the only question was whether the master had a right in the circumstances to punish the boy at all. Mr. Justice Ridley, who tried the action with a special jury, expressed his personal opinion on this subject at a very early stage of the case; and when he came

to sum up he said that, while there was no question that the action of the defendant had been honest, it was for the jury to say whether his conduct had been 'reasonable or arbitrary.' The jury having found a verdict for the plaintiff on which a stay of execution was granted, it will be for the Court of Appeal to say whether the direction of the learned judge was adequate, or whether the limitations of the right to punish fixed by Chief Justice Cockburn half a century ago in a schoolmaster's case (*Reg* v. *Hopley* 1860) are not to be preferred. Those limitations are that punishment must not be administered 'for the gratification of passion or of rage,' and it must not be 'immoderate and excessive in its nature or degree.' Beyond that the old rule laid down in Blackstone (*Commentaries*, Vol. 1, 453) still holds—the tutor or schoolmaster stands *in loco parentis* 'and has such a portion of the power of the parent committed to his charge; namely, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.' That this power of correction extends to cases where the offence is committed outside the school has also been established in a comparatively recent case (*Cleary* v. *Cooth* 1893); and as all these settled rules seem to be challenged by the result in this case, we shall await with interest the decision of the Court of Appeal on the delicate problems of parental dispensation versus school discipline which the contest involves.

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Miscellany.—Mr. Justice Darling contributes to the November number of the *Cornhill Magazine* some verses entitled 'A Letter from a Vacation Judge.' They are a reply to a 'tempting invitation' to spend a holiday with a friend in the country who has offered him the pleasures of hunting and shooting :—

Your forest hounds may chase the deer,—
  From turnips to the stubble
The partridge fly—I think I hear
  Your right and left speak double,—
Yet I must mark the well-worn tale,
  As though to me a new one,
Composed and learnt by rogues on bail,
  And vouched by friends a true one.

An alibi to prove, the thief
Was watching with his brother
Beside her bedside—plunged in grief
For their expiring mother.

Most of the modern poets of the Bench have been translators. Lord Bowen's literary gifts found expression in his translation of the 'Æneid'; Mr. Justice Denman's most notable achievements as a poet were his translation of Gray's 'Elegy' into Greek elegiac verse and his rendering of the first book of the 'Iliad' into Latin; Lord Justice Kennedy turned the 'Plutus' of Aristophanes into English verse; while Mr. Justice Ridley is the author of a translation of Lucan's 'Pharsalia.' Many other Judges have written occasional verse, Blackstone and Lord Selborne among the number. The most famous judicial author of modern times was Mr. Justice Talfourd, whose tragedy 'Ion' was produced at Sadler's Wells two years after he was raised to the Bench, and whose sudden death in the Assize Court at Stafford is the theme of the best of Mr. Justice Darling's poems, 'On the Oxford Circuit.'

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What is the origin of the 'patriarchal and apostolical number of twelve' in the administration of justice, which Mr. Justice Ridley, owing to the shortage of jurors, has expressed a desire to reduce? Coke thought that it was enveloped in mystery, and lesser mortals (says the *Globe*) need not worry to inquire where he was baffled. What is certain is that, firmly established as the 'legal number' has become, it was not always treated as sacred. By a special statute of Henry VIII., for instance, juries of six were allowed in Wales, and a case tried in 1652, thought it resulted in a declaration that a Cornish custom of having similar juries was bad, showed that the custom had obtained pretty widely in the county. Grand juries are nearly twice as large as ordinary juries, and so are juries at lunacy inquiries; while the number of the County Court jury which formerly was five, has recently been fixed at eight. So that there is nothing sacred, after all, about the 'patriarchal and apostolical number' though whether it is desirable to change it, either in civil or criminal cases, is a question on which legal authorites are much divided.

BOOK REVIEWS.

CASPERZ ON ESTOPPEL—FOURTH EDITION, 1915, *Butterworth & Co., (India) Limited, Calcutta.*

The scheme and merits of this book are already too well-known to the profession to require any lengthy description or commendation from us. It is the only work on the subject that incorporates both the Indian and the English case law and, as such, it has already obtained a wide popularity; while the accuracy of statement and thoroughness of treatment which characterise the book have brought for it a well deserved recognition as an authoritative text-book. The demand for a new edition within six years of the last one is ample proof of the want as well as the utility of the book. The last edition was a complete revision of the previous one, but the present is substantially on the same lines as the last one, the authorities however being brought up to date, *i. e.*, down to October 1915. We heartily commend this edition to the profession.

THE ALL INDIA CIVIL COURT MANUAL, *Local Acts—Central Provinces, Law Printing House, Mount Road.*

We congratulate the publishers for the Central Provinces Code. The legal profession will find it a fitting supplement to the Local Acts of other provinces and as supplying a real want.

SANJIVA RAU'S *Indian Contract Act (Second Edition)' Law Printing House, Mount Road.*

This book brings up to date Sanjiva Rau's publication of the enactment in 1906 which was so popular with the legal profession. As is very properly printed out in the preface, this book occupies a middle place between the condensed digest and the learned treatises in the subject of contracts. The references to cases decided by the Chief Courts enhance the value of the publication by making it useful to practitioners in the provinces under Chief Courts.

SANJIVA RAU'S *All India Digest, Criminal (1835 to 1915) Vol. I, Law Printing House, Madras.*

The rapidity with which the first edition of this publication has run out bears ample testimony to the great need felt by lawyer

for this publication. We need only point out that the cases have been brought down to 1915 and the work has been thoroughly revised keeping its utility to the bar steadily in view.

THE OFFICIAL DIARY, 1916—THE LAWYER'S COMPANION DIARY, 1916, *Law Printing House, Madras.*

We have very great pleasure in announcing to the legal profession that the Law Printing House have brought out their excellent diaries for 1906. These diaries contain a large amount of useful legal information necessary for the daily use of the lawyer and his clerk. The size of the diaries has been increased, chiefly owing to the addition of pages for the year 1917 so as to enable practitioners to note up the prospective engagements of the coming year. We have every reason to believe that the diaries for 1916 will maintain the high level of usefulness as those for the preceding years.

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NOTES OF INDIAN CASES.

Annapurna Dasee *v.* Nalini Mohan Das, I. L. R., 42 C. 10.

The conclusion of the learned Judges in this case that a succession certificate may be granted in respect of *any portion* of a debt due to a deceased person, certainly goes further than the authorities cited. Impressed as one may be by some of the complications and hardships pointed out in *Mahomed Abdul Hossain* v. *Sarifan* [1], as resulting from the extreme view taken in *Ghafur Khan* v. *Kalandari Begam* [2], it seems fairly clear that the Succession Certificate Act did not contemplate certificates being granted in respect of 'fractions' of a debt. Neither in S. 4 (1) (a) which describes the claimant as a person 'entitled to the effects of the deceased person or *to any part thereof*' nor in S. 7 (4) which deals with the case of 'more than one applicant interested in the estate of the deceased' is there anything to justify a splitting up of the debt, whether by the court or at the option of the applicant. The arguments of convenience or hardship are really matters for the legislature. Much of the observations on the present question, in *Mahomed Abdul Hossain's case* may well be said to be *obiter*, in the view there taken by the learned Judges as to the nature of the right to a deferred dower, *i.e.* that it is not a 'single' debt devolving (on death) on two or more heirs in several shares, but that each heir has a distinct right, enforceable by himself, in respect of his share. And as for the stress laid on the difference between the question of the grant of a certificate for a share and the maintainability of a suit for a share, it ought not to be forgotten that the Act is intimately connected with procedure law which is adopted as the means of enforcing the Act, *viz.*, by the prohibition in S. 4 that no Court shall pass a decree except on production of a certificate etc. The legislature should not be assumed to have

1. (1911) 15 C. W. N. 231 s. c. 15 C. L. J. 584.
2. (1910) I. L. R. 33 A. 327.

provided for the grant of a partial certificate with the clear knowledge that no suit could be maintained on the basis of it. Even taking into consideration the possibility of voluntary payments by the debtors (when they are assured protection under S. 16 of the Act), the question of 'shares' as between different heirs is not one always free from difficulty and it is difficult to assume that no provision for its determination would have been made in the Act, if the legislature had contemplated such fractional certificates. Justice Mukerjee may be right in criticising the Allahabad Full Bench in so far as they held that certificate duty must be paid in respect of the whole amount due to the deceased even when the debtor himself has become entitled to a portion thereof as one of the heirs of the creditor (cf. *Muhamad Ali Khan* v. *Bibi Puttan* [1],) but we venture to doubt if any principle can be found on which to base a claim for reduction of duty on the ground that as the debtor is not solvent enough to pay the whole debt, the heirs are willing to relinquish the irrecoverable portion.

Accepting however to the full, the force of Mr. Justice Mukherjee's observations, we doubt if he meant to lay down that even without reference to any question, of the 'share' due to the applicant or any question of relinquishment of the portion not claimed, a person can at his option obtain a certificate in respect of *any portion* of a debt due to the deceased. This is practically what the learned judges have held in the case under notice. The result would be—and the tenor of their observations would even seem to justify several successive applications by the same person for certificates in respect of different portions of the same debt. Surely this could not have been intended, though even such a view may not affect the revenue derivable under the Act.

Abdulla Hossein Chowdhury *v.* **Administrator General of Bengal,** I. L. R. 42 C. 35.

This case furnishes an illustration of the doubts and difficulties arising from the multiplicity of legislative machinery and the piecemeal character of the legislation governing India. In determining the question of the validity of S. 12 (2) of the Limitation Act, in so far as it applies to applications for leave to appeal to the Privy Council, we doubt if much reliance could be placed on

1. (1896) I L. R. 19 A. 129.

the fact that S. 8 of Act VI of 1874 was submitted to and approved by the Judicial Committee; for even if this could be taken to imply any consideration of or opinion on the question of its *validity*, the provision as it then stood did not really 'affect' the rule laid down by the Order in Council of 1838. Beyond reproducing the limitation of six months, it only added what even in the absence of such a provision, might have been held as a matter of principle (well recognised though sometimes doubted) *i. e.*, that if the six months expire when the court is closed the application may be made on the day that the Court re-opens. The Limitation Act of 1908 distinctly interferes with the order in Council, by providing for the exclusion of the time requisite for obtaining a copy of the decree. The only solid ground to proceed upon would seem to be that the High Courts Act and the Letters Patent clearly contemplate the alteration of the existing Orders in Council, by the exercise of the legislative powers of the Governor-General in Council.

Raghunath Das *v.* **Sundara Das Khetri,** I. L. R., 42 C. 72 (P. C.).

The observations in *Malkarjun* v. *Narhari* [1], though carefully worded, have given rise to frequent misapprehension (if not also misapplication) as to the effect of faults of procedure. Their Lordships' Judgment in the present case is based on the fact that the notice served on the Official Assignee, after the insolvency of the judgment-debtor, merely called upon him to show cause why he should not be substituted in the suit for the judgment-debtors and did not ask him to show why the decree should not be executed against him. Technical as this distinction may seem, there is really, as their Lordships point out, a great deal to be said for it; but for this circumstance, it is impossible to see how the Official Assignee could have allowed the property to be sold in execution in respect of an unsecured debt. We cannot however help observing that it is difficult to see how S. 248 can apply to the case. The definition of 'legal representative' makes it clear that it has reference only to devolution *on the death* of a party; the Official Assignee is not the 'legal representative' of the insolvent. As for Ss. 32 and 372 of the Code of 1882 it is, as their

1. (1900) I. L. R. 25 B. 337.

Lordships point out, very doubtful if they can be availed of *after* decree; and there is the further question whether in the case of an action 'in personam' S. 372 can be applied at all, even if the insolvency happened during the pendency of the suit; for in such a case there is no 'devolution of interest' in the subject-matter of the suit (Cf. observations of Sir Bhashyam Iyengar in *Punithavelu* v. *Bhashyam Iyengar* [1], on *Miller* v. *Budh Singh* [2].)

Reading through the judgment one cannot help wondering how the learned Judges of the High Court gave effect to the title alleged under the execution sale. All that they say is that 'the Official Assignee having been added and having taken no exception to the procedure the sale must be regarded as having taken place in his presence and as binding on him' and *Malkarjun* v. *Narhari* [3], is relied on to get over all irregularity. In distinguishing the case before them from *Malkarjun* v. *Narhari* [3] their Lordships of the Judicial Committee endorse the view taken in *Gopal Chunder Chaterjee* v. *Gunamoni Dossee* [4], that a notice under S. 248 of the old Code (O. 21, R. 22 in the Code of 1908) is essential to give the executing court jurisdiction to sell the property as against the legal representative of a deceased judgment-debtor. This must be taken to overrule the more recent decisions in Calcutta which hold that before a sale can be set aside on the ground of omission to serve such a notice it must be proved that the omission has resulted in substantial injury (see *Kumed Beeva* v. *Prasanna Kumar Roy* [5] and cases there cited.) In an earlier part of the judgment their Lordships express approval of the view taken in *Sarkies* v. *Bandho Baee* [6] that an order for sale has no greater effect than an attachment, in affecting the title to the property or preventing, its vesting in another by operation of law. This view will, as pointed out by us on a former occasion (see 27 M. L. J. p. 8. Notes of Indian Cases) entail a reconsideration of the interpretation placed by some decisions in this country on the observations in *Suraj Bunsi Koer's case* relating to the effect of proceedings in execution upon the operation of the rule of survivorship as between members of a joint Hindu family.

1. (1901) I. L. R. 25 M. 406.
2. (1890) I. L. R. 18 C. 43.
3. (1900) I. L. R. 25 B. 337.
4. (1892) I. L. R. 20 C. 370.
5. (1912) I. L. R. 40 C. 45.
6. (1866) 1 N. W. P. 172.

Forbes v. Secretary of State for India. I. L. R., 42 C. 151.

It is possible that executors and administrators were omitted by oversight from Ss. 20 to 23 of the Income Tax Act; otherwise there is no reason why they too should not in express terms have been allowed the privilege of 'retainer' conferred by the last clause of S. 23 on trustees, curators, agents, etc. But this circumstance certainly affords no support for the argument that an executor is not liable to be taxed in respect of income received by him as executor. As to the maintainability of a suit to question, the Collector's decision, it is difficult to say what circumstances would take a case out of the very wide language of prohibition used in S. 39—except perhaps in the case of an assessment on exempted incomes. There are cases, under other fiscal enactments, holding that the *liability* to (as distinguished from the amount of) assessment may be canvassed in a Civil Court, but it must be admitted that the language of exclusion used in those enactments is generally not so comprehensive as that used here. The tenor of the Chief Justice's observations in this case would suggest that if the Collector acts 'without jurisdiction' it may be made the subject of a civil suit. But it is by no means clear from the Act what the 'essentials' of his jurisdiction are. For instance, it is not allowed to a man to come to Court and show that he does not get that amount of income which the Collector assesses him for or perhaps even that his income is below the taxable minimum. Perhaps a man can sue on the footing that he does not receive *any portion* of the income for which he has been assessed—but happily instances of this kind can scarcely ever arise.

Harchand Panaji v. Gulabchand Kanji, I. L. R., 39 B. 34, **Veeraraghava Iyer v. Muga Sait,** 27 M. L. J. 585 (F.B).

Practically the same questions were raised in both these cases; the Bombay Judgment however does not deal with the broad contention which seems to have been urged in the course of the argument, that in view of the language of S. 44 and O. 21, r. 7 C. P. C., a British Indian Court has no power to question the jurisdiction of a Native State Court to pass a decree transferred to the former for execution. On this point, the Madras

case holds—and if we may say so, rightly—that the British Indian Court has such power. On the question of the jurisdiction of the Native State Court, the Bombay Judges hold that by pleading *on the merits* as well, the defendant had submitted to its jurisdiction though in terms he protested against it. This conclusion has the support of Mr. Dicey though the law on the point is far from settled and there appears to be little or no direct authority on the point. *Boissiere* v. *Brockner* [1], cannot be safely relied on, for there Cave, J. went the extreme length of holding that even an appearance *merely to protest* (without any attempt to defend on the merits) would constitute a submission to jurisdiction—a view that does not seem to commend itself to Mr. Dicey. Professor Dicey relies on the principle of cases like *Davies* v. *Price* [2], and *Ringland* v. *Lowndes* [3], in support of his dissent from Justice Cave's view,—though the question there did not *arise* in connection with foreign judgments. But these cases are in turn inconsistent with his own view that an appearance even under protest would amount to submission, where it is accompanied by an attempt to defend on the merits: also *Voinet* v. *Barret* [4] is, despite the eminence of the judges who took part in it, far from convincing. At any rate, it allows that the fact of a person defending the case on the merits before the foreign Court is not by itself *conclusive* on the question of that court's jurisdiction for purposes of international law. If when he appears to protect property *already attached* by the foreign court, the circumstance of his taking the chance of a decision there in his favor does not prevent him from afterwards raising the question of jurisdiction in a domestic court, there is no reason why the rule should be otherwise when he appears *under protest* and pleads on the merits as well. The position is not really explained by saying that in the one case the appearance is voluntary and in the other, not so; and the way in which the distinction has been applied in *Voinet* v. *Barret* [4] does not seem to commend itself to eminent writers on Private International Law. It will be interesting to see if and how the House of Lords will settle these and connected questions should they come up before it in the

1. (1889) 6 T. L. R. 85.
2. (1864) 34 L. J. Q. B. 8.
3. (1864) 33 L. J. C. P. 337.
4. (1885) 55 L. J. Q. B. 39.

near future. We do not however appreciate the attempt of the Bombay Judges to distinguish the case before them from *Parry & Co.* v. *Appasami Pillai* [1]. They might have frankly said —as Wallis, C. J., said in the Madras Full Bench case—that that decision cannot any longer be accepted as correct. If the facts there can be held to support the inference of an 'involuntary' appearance, the same can be said of almost any case, for the defendant would never care to appear before the foreign court unless he expected some inconvenience to arise from a decree that may be there passed against him. Even on the facts of *Veeraraghava Iyer* v. *Muga Sait* [2], we beg leave to doubt if the defendant's appearance before the Cochin Court could be properly held to be involuntary, within the principle of *Voinet* v. *Barret*. The plaintiff had merely obtained an *interim* injunction restraining the defendant from disposing of certain logs of timber in Cochin: there was no question of 'seizure' of property by the court or of the defendant appearing to protect it. The question of 'voluntary submission' may in a sense be a question of 'fact,' but if Wallis, C. J., meant to hold that it is a matter beyond the cognisance of a court of second appeal, even when there is no dispute as to the facts with reference to which the question has to be decided, we beg to differ from him. It is a matter of 'legal inference' like a finding of 'acquiescence' which the Privy Council held can be reviewed on second appeal (see *Beni Ram* v. *Kundan Lal* [3].

Rama v. Bhagchand, I. L. R. 39 B. 41.

There is room for difference of opinion on the point dealt with in this case; but so far as one is able to see from the judgment, the learned judges do not seem to have sufficiently realised the force of the arguments against their view. It will no doubt be anomalous if a mortgagee who had obtained a decree for sale should on the mortgagor's default to pay within the time fixed be enabled to place himself by mere inaction on his part, in the position of an absolute owner. But what is the answer to it? Not to disregard established rules of procedure and allow another

1. (1880) I. L. R. 2 M. 407. 2. (1914) 27 M. L. J. 535.
3. (1899) I. L. R. 21 A. 496 (P.C.)

suit—this time by the mortgagor—for a relief which undoubtedly could have been had under the first decree. The theory of the right to redeem existing so long as the relationship of mortgagor and mortgagee subsists, is not without its limitations in adjective law as pointed out in *Vedapuratti* v. *Vallabha Valiya Raja* [1]. The learned judges admit that in the new suit the mortgagor cannot go behind the decree in the mortgagee's suit in so far as it settled the amount of the mortgage debt; and this limitation they think is sufficient to satisfy the rule of *res judicata*. But, is not the whole suit—and not merely the issue as to the amount—covered by the former adjudication? Or, in the words of S. 11 C. P. C, has not the matter directly and substantially in issue in the 2nd suit—*viz.*, the plaintiff's right of redemption—been so in issue, *and also heard and decided*, in the former suit? What new point, right or question has the Court to hear or decide in the second suit. It will be impossible to contend that for the application of the rule of *res judicata*, to *suits* (as distinguished from 'issues'), the persons should on both occasions be arrayed alike, whether as plaintiffs or as defendants. It accordingly seems to us that there are strong reasons against the maintainability of a second suit in respect of the mortgage, whether the first suit had been brought by the mortgagor or by the mortgagee. The only way out of the anomaly pointed out at the outset would seem to be indicated in *Audipurnam Pillai* v. *Gopalasami Moodely* [2]. As therein held, the time limit for payment in the decree for sale is only intended to stay the hands of the mortgagee, during that period; the mortgagor (defendant) can therefore even after the lapse of the time fixed, pay the decree amount into Court in satisfaction of the decree, and when he so pays, his claim to enforce his right to possession will properly be a question relating to the satisfaction of the decree and as such governed by S. 47 C. P. C. (old S. 244). There can be little doubt that if the mortgagor (defendant) pays within the time fixed in the decree, his claim to possession (if any) reconveyance, etc., as per terms of the decree will fall under S. 47. There is then no reason why a similar claim made on payment *after* the time fixed—assuming of course, such payment to be allowed by law—

1. (1901) I. L. R. 25 M 300. 2. (1908), I. L. R, 31 M. 354.

should not likewise come under S. 47. In this view, the mortgagor must make the payment and claim possession, etc., at least within the time allowed under Art. 178 of the Limitation Act of 1877 (the residuary article)—but even this limit seems to have been exceeded in the Bombay case under notice—and if he fails to do even that, one may be pardoned for contending that the Court need not be solicitous to help him at any cost.

The above line of reasoning proceeds on the view that the decree in the suit for sale was (under the law as it stood prior to 1908) a 'final' decree. It will be a matter for argument whether what the new code calls the 'preliminary decree' in a mortgage suit is not, under the scheme of that Code, sufficiently 'final' for the purposes of the rule of *res judicata*. Otherwise, it may be open to question whether the adjudication in the 1st suit will be binding even as regards the 'amount' fixed thereby. Under the scheme of O. XXXIV of the new Code, where the mortgagee (decree-holder) does not, on default by the mortgagor, apply for a 'final decree' under R. 5 the result will be that the suit must still be regarded as *pending*; and even then, as pointed out by Sir Bhashyam Iyengar, the *trial* of a second suit will be precluded by S. 10 C. P. C., which is even wider than S. 12 of the old Code. If it be not open to the mortgagor (as defendant) to carry the suit to 'final' decree, he must at least move the court to dismiss the suit for want of diligent prosecution by the plaintiff, before he can himself maintain an action for redemption.

Umabai *v.* Amritrao Anant. I. L. R. 39 B. 80.

It may be that an order in execution, which though not warranted by law, had become final as between the parties, could not be nullified by means of a later order striking the petition off the file before the decree is satisfied as per terms of such irregular order. But we are unable to agree that the order in question in this case is one falling under O. 21, r. 52, C. P. C., or any of the other provisions in the execution chapter. It was to the effect that the defendant's share of the revenue of three Inam villages should (year after year till the decree is satisfied) be paid by the

village officials to the Court's order and was to be paid by the Court to the plaintiff. It is clear, as was held in *Tulaji* v. *Balabhai* [1], that O. 21, r. 52 only provides for the attachment of property which *at the time of such attachment* is in the custody of the Court or any public officer. The learned Judges think that the above order did not violate this principle, inasmuch as the 'estate' which produced the revenue was in existence at the time and on the attachment of the 'estate', the revenue accruing therefrom *in futuro* will be on the same footing as 'dividend or 'interest' provided for in the rule. As against this view there is, first, the question, which the learned Judges themselves advert to, namely, whether O. 21, r. 52 contemplates the attachment of 'immovable property' at all. But assuming that it does, it will apply only if the 'estate' which is attached and not merely the 'revenue' therefrom is 'in the custody of a public officer.' In the particular case, the fact that the village officials collected the revenue and paid it to the defendant will not constitute possession or custody of the 'estate' (meaning the right to the revenue) by the village officials. Further, even if the case comes within O. 21, r. 52, we are unable to see what power the Court had to direct that the revenue should be paid into Court by the village officials. The rule only provides for 'attachment'; and in all 'garnishee' cases, the Indian Procedure only provides for sale of the property attached (whether movable or immovable), though the garnishee *may if he chooses* pay the money into Court. It is only in the special case of salaries or allowances of public officers, railway servants, &c., that O. 21, r. 48, C. P. C. imposes an *obligation*, on the part of the garnishee (so to say) to pay into Court and the obligation is extended in this case both to salaries accrued due and to salaries becoming payable *in futuro*.

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1. (1896) I. L. R. 22 B. 39.

NOTES OF INDIAN CASES.

Basangavda *v.* Basangavda. I. L. R. 39 B. 87.

The main question of Hindu Law decided in the case is of little importance outside the Bombay Presidency, as the rule of admitting the widow of a deceased Sapinda to succeed as a Sapinda is confined to that Presidency. We would, however, invite attention to the remarks of Beaman, J. in the case, as to the true scope of the doctrine of 'acceleration' by Hindu widows, the prevalent confusion between 'acceleration' and 'alienation with the reversioner's consent' and the absurdity of discussions about a reversioner 'consenting' to an alienation *in his own favour.* As usual with that learned Judge, the observations are alike instructive and refreshing.

Dhondo Ramchandra *v.* Bhikaji. I. L. R. 39 B. 138.

If one topic of mortgage law can be said to be beset with more difficulties and uncertainties than another, it is that relating to the remedies of a person holding more mortgages than one over the same property. One question in such a case is whether at all the mortgagee can sue except on *both* the mortgages. Cases like *Dorasami* v. *Venkataseshu,* [1] held that he cannot; and the *first* suit itself was dismissed as not properly constituted. It will be noticed that in such cases there is no scope for any plea of *res judicata* or bar under O. 2, r. 2, C. P. C.—for there has been no prior suit. The question of the maintainability of a suit on either of two such mortgages without including the other has, so far as Madras is concerned, now been settled by the decision of a Full Bench; and the learned Judges of the Bombay High Court, too, would seem to grant that, at any rate in view of the explanation to O. 34, r. 1 of the New Code, the first suit would be maintainable. The further question then is, what is the effect of the first suit on the other mortgage not included in it. In spite of the needless caution characterising the remarks in *Sri Gopal* v. *Prithi Singh* [2] the Bombay case holds—and, if we may say so, rightly—that a second suit on the other mortgage will not be barred under O. 2, r. 2 C. P. C. But the learned Judges say that such a suit will be barred by the general principles of *res judicata* unless the rights under the

1. (1901) I. L. R. 25 M. 108. 2. (1902) I. L. R. 24 A. 429.

mortgage (sought to be enforced in the second suit) are *reserved* in the first suit. This conclusion they deduce from the principle of *Sri Gopal* v. *Prithi Singh.*[1] We beg leave to doubt the correctness of this view, if so broadly stated. The operation of the rule of *res judicata* in connection with a mortgage *not pleaded* in a former suit is contingent upon the existence of a *duty to plead* such mortgage in that suit; and as pointed out in *Surjiram Marwari* v. *Burhandeo Persad* [2], the rule in *Sri Gopal* v. *Prithi Singh* [1], will not apply to cases where there was no question raised in the first suit about the mortgage sought to be enforced in the second suit. (*Cf. Krishna Doyal Gir* v. *Syed Md. Amirul Hassan* [3]. The fact that both mortgages are held by the same person can make no difference for this purpose. Hayward, J. observes that the view taken by him would not substantially prejudice the mortgagee 'because, he would be able, if he so desired to keep his prior mortgage alive by requiring that the sale of the property should be subject to the prior mortgage.' But this does not help us to any decision on the legal question. It is said that if the mortgagee should be allowed to sell the property without disclosing the prior mortgage and then to enforce the prior mortgage against the execution purchaser, it may open the door to fraud, but this raises a question not of *res judicata* but of *estoppel* which will depend on the knowledge of the purchaser in each case.

It may be that after a suit and execution sale on the first mortgage, the mortgagee cannot seek to enforce a *later* mortgage: this will rest not on the rule of *res judicata,* but on the principle that a sale on a first mortgage conveys the property freed of all subsequent incumbrances; and no such question can arise when the first suit and execution sale were on the subsequent mortgage.

Satwaji Balajirav *v.* Sakhar Lal Atmaram Shet. I. L. R. 39 B. 175.

The point decided in this case is one really of 'practice' and it is to be regretted that on a question of this kind, which frequently comes up before the Court, there should be such a conflict and uncertainty as one will see from the authorities

1. (1902) I. L. R. 24 A. 429. 2. (1905) 1 C. L. J. 337.
3. (1911) 19 C. W. N. 912.

referred to in the judgment under notice, and the judgment of the Madras High Court in *Ramaswami Kone v. Sundara Kone* 1. When a court fixes a time by its decree for performance of some act, it seems natural to hold that the period is to be calculated from the date of *that* decree; and if the time is allowed to elapse without performance, the right conditioned on such performance is *lost*, and it can be *revived* only by some positive direction in the decree of the appellate Court. This is substantially the basis of the ruling in *Ramaswami Kone's case*, and despite several rulings or dicta to the contrary, it seems to be well-founded in principle. Decisions with reference to limitation for purposes of execution have no bearing on the question, because they rest on the specific provision of the Limitation Act making the date of the 'appellate' decree the starting point. Nor is the decision in *Raja Bhup Indar Bahadur Singh's Case* 2, directly authoritative on the point, though Lord Hobhouse's observation,—that an appellate decree confirming the decree of the Lower Court 'adopts its terms and carries on their effect down to a later date'—is couched in very wide language. It will greatly add to the uncertainty of the law if the conclusion on the point is, as sometimes suggested, to be made to depend upon considerations as to the party appealing, *i. e.*, plaintiff or defendant, or the form which the ultimate disposal of the case takes, *i. e.* rejection, dismissal or confirmation. The rule of interpretation laid down in *Ramaswami Kone's case* seems to us the sounder one and any hardship caused thereby can be avoided if the suggestion made at the end of the judgment in that case is borne in mind by the Court and Counsel concerned with the appeal.

Dayamayi v. Ananda Mohan Roy Chowdhry. I. L. R. 42 C. 172 (F. B.)

An elaborate and interesting discussion in the course of argument (which might, with advantage, have been reported even more fully) materialised in nothing more than a few carefully worded propositions which constitute the judgment of the Court. The questions directly under consideration have little importance outside Bengal, as they relate to incidents of occupancy tenure which do not obtain elsewhere.

1. (1907) I. L. R. 31 M. 28. 2. (1900) L. R. 27 I. A. 209.

Sanyasi Charan Mandal *v.* **Ashutosh Ghose.** I. L. R. 42 C. 225.

The legal position of what may be called joint family firms carrying on an ancestral business is not without its anomalies and in the application of the rules of insolvency law to them, questions must arise in respect of which the English law can afford no precedent or guidance. One characteristic feature of such a firm is that even as between members *sui juris* the relationship to the common business is not contractual, and this involves the consequence—not existing in the case of ordinary partnerships—that there may be debts of the *firm*—for which the individual members are not *personally* liable, but only to the extent of their interest in the family property. The reasons urged in this case against adjudging an *infant* member of such a firm insolvent will thus equally apply to members *sui juris*. And if the receiver in insolvency can take possession only of the properties (or share) belonging to the person who is adjudged an insolvent—and this is all that S. 16 (2) of the Provincial Insolvency Act provides for—the utility of insolvency procedure will, in such cases, be reduced to a minimum and other means will have to be found for the realisation and distribution among the firm's creditors even of property admittedly liable for their debts.

In applying in this country the English rule as to the consequences of the bankruptcy of a partner, the learned judges indeed point out that under the Indian law, the insolvency of a partner does not *ipso facto* work a dissolution, but only entitles the other partners to apply to the Court to dissolve the partnership. But in the case of a joint family business, we doubt if even this can be done, without a suit for a *complete* partition. Before the insolvency and as long as the joint status continues, the managing member could dispose of the whole or any portion of the family property, to meet the liabilities of the family business. What is the effect of his insolvency on these rights and who is to exercise them thereafter—the insolvent or the receiver? The judgment seems to take no note of this aspect of the matter. An analogous question has received some discussion in *Fakir Motichand* v. *Motichand Hurruckchand*[1], *Rangayya Chetti* v. *Thanickachella Mudali*[2] and *Sadarmal* v. *Aran-*

1. (1883) I. L. R. 7 B. 438 441.
2. (1895) I. L. R. 19 M. 74.

vayal Sabhapathi [1]; but in those cases the discussion turned on the language of Ss. 7 and 30 of the old Presidency Towns Insolvency Act (11 & 12, Vic. C. 21) whose language is wider than that of S. 16 (2) of the Provincial Insolvency Act of 1907. (As to the effect of Ss. 7 and 30 in the case of the insolvency of a sole surviving partner, see judgment of Justice Wallis in *Administrator-General of Madras* v. *Official Assignee of Madras* [2].) Even with reference to those cases, Sir Bhashyam Iyengar observed in *Nunna Setti* v. *Chidaraboyina* [3], that the managing member's power cannot be regarded as his *property* (within the meaning of S. 7) and that, if the matter were *res integra*, he should hesitate to hold that it was such a power as would pass to the Official Assignee under S. 30.

Dealing with a partnership of which an infant was a member, the House of Lords in *Lovell & Christmas* v. *Beauchamp* [4], held that a receiving order could be made only as against the adult partners, but the Lord Chancellor added, 'I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors.' This decision is understood by White, C. J., in *Administrator-General of Madras* v. *The Official Assignee of Madras* [5] as supporting the view that without any separate suit for winding up the affairs of the firm, the Official Assignee can in virtue of the vesting order against a sole surviving partner, exercise in the course of the insolvency proceedings themselves, all the powers which such partner had over the partnership assets, for the purpose of making them available for the firm's creditors. In the Calcutta case under notice, it is suggested that the decision of the House of Lords does not support the view that the court can in the bankruptcy proceeding itself direct the receiver to deal with assets other than those belonging to the persons who have been adjudged insolvents; and it is sought to deduce, from an examination of the course of proceedings in that case, that the direction to the receiver to deal with the *whole* assets of the partnership was made not in the bankruptcy proceeding, but in the appeal by the infant against the decree for money originally passed against the firm (on which the bankruptcy petition was founded). We are unable to see the connection between the appeal against a

1. (1896) I.L.R. 21 B. 205.
2. (1909) I.L.R. 32 M. at p. 465.
3. (1902) I. L. R. 26 M. 21[illegible].
4. L. R. 1894 A. C. 607.
5. (1909) I. L. R. 32 M. [illegible]62.

particular decree for money and an order for a receiver to take charge of the partnership assets for the benefit of the firm's creditors generally. But even apart from this, we do not feel convinced as to the soundness of the explanation. After pointing out that the judgment should either have been against the adult partner alone or against the firm excepting the infant partner, the Lord Chancellor proceeds to say that if the judgment had been in either one or the other of these forms, a receiving order might have been properly obtained against the adult partner and 'in the proceedings in bankruptcy the partnership assets might have been made available for those who had given credit to the firm.' In the light of this passage, it is difficult to accept the explanation that the partnership assets were not meant to be dealt with under orders in the bankruptcy proceeding. In any other proceeding the assignee in insolvency could not claim or get anything more than the insolvent's *share* of the assets and the observations of the Lord Chancellor cannot fit in with that kind of remedy.

Jalandhar Thakur v. Jharula Das, I. L. R. 42 C. 244 (P.C.)

We cannot help wondering how the High Court held that the dismissal of the former suit by the widow to set aside the decree and sale on the ground of fraud barred the present suit by the reversioner to recover the property *in spite of* the decree and sale or, if he had to question them at all, to question them on grounds not available to the widow. However as the point was abandoned before the Privy Council—and, their Lordships say it was untenable and 'very properly abandoned'—it deserves no further discussion. On the question of limitation, their Lordships leave open the question of the starting point for adverse possession in cases in which a person holding a limited estate in a religious office alienates it and the alienee takes possession (*Cf. Pydigantam Jagannadha Row's Case* [1].) For the purposes of the case before them, it was sufficient to say that Art. 124 of the Limitation Act cannot apply to a case in which the defendant has not been discharging the duties of the office, but merely receiving the emoluments attached thereto; for in such a case the suit cannot be for 'recovery of the office.' This affirms the view taken by the Madras High Court in *Kamalathammal* v. *Krishna Pillai* [2],

1. (1904) I. L. R. 28 M. 197. 2. (1910) 20 M. L. J. 781.

and in effect disposes of the contention, sometimes urged on the strength of the Explanation in the 3rd Column of Art. 124, that the enjoyment of the emoluments must by itself be held to constitute possession of the office, so as to make Art. 124 applicable. One question that has often been raised is whether or not the continued enjoyment of the whole or a specific portion of the emoluments by a stranger, can by operation of the law of limitation lead to the dissociation of the emoluments (or portion thereof) from the office—and if so, when does adverse possession begin—so as after the lapse of a specified period, to bar future holders of the office from suing to recover such emoluments. In the particular case before their Lordships, the emoluments in question consisted of a share of the daily offerings, but they observe broadly 'By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, Jharula Das acquired no title and no right to a share of that income. On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait.' We however doubt if this passage will justify the view that even in cases in which the emoluments consist of the income from specific immovable property (capable of *possession*) and a stranger takes possession of it and enjoys it, the shebait and in fact each successive shebait, will have a cause of action *de die in diem*, so as to exclude any question of adverse possession and extinction of title, through such possession, so far as the property is concerned.

Amulya Ratan Sircar v. Tarini Nath Dey, I. L. R. 42 C. 254.

The only question of general interest argued and decided in this case seems to be the applicability of the doctrine of estoppel as between the heir-at-law of the owner of a non-transferable holding and the devisee thereof from the owner. The learned Judges argue that there is no estoppel as between the testator and the devisee which can be said to bind the heir-at-law and that there is no principle on which an independent estoppel can in such circumstances

be held to arise as against the heir. We beg leave however to doubt if the decision of Justice Doss in *Hari Das* v. *Bairagi Udoy Chandra Das*[1] upholding a devise of the kind in question here really rests on the doctrine of 'estoppel' properly so called. We rather understand the learned Judge to proceed on the view that a transfer of an occupancy holding is valid and operative *as between the parties* (though not as against the landlord) that therefore the will is operative to divest the testator of his right in the holding, at the moment of his death and that the heir-at-law, who comes in by no superior or paramount title, can take only what is left of the testator's estate. The conclusion rests not on any rule of estoppel but on the theory of a *valid divestitive act*; and in this view it could make no difference whether the transfer was for consideration or not and whether it was *inter vivos* or by will.

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1. (1908) 12 C. W. N. 1086.

NOTES OF INDIAN CASES.

Syed Ibrahim Saheb *v.* **Arumugathayee** : 38 Mad. 18.

"There is nothing to prevent the appellant," observe their Lordships in this case "from attacking only a portion of the decree, although the reason for the attack might cover the whole decree.". This may be a sound rule to lay down for to hold the contrary is to introduce a new kind of *res judicata* without any statutory warrant therefore on a theory of necessity to avoid conflicting judgments. But it has considerable authority in support of it. See *Ragunath Singh Manku* v. *Pareshram Mahata* [1], *Kandasami Chetty* v. *Annamalai Chetty* [2] *Kulai Kada Pillai* v. *Visvanatha Pillai* [3]. It was not necessary however to decide this point as their Lordships decided the appeal on a ground limited to the subject matter of the appeal. The ground that went to the root of the case, viz., whether the doctrine of subrogation will enable a party to use the extinguished mortgage not only as a shield but also as a sword, has since been decided in this Court so as to limit it to the former purpose, *Maharaja Pillai* v. *Narasimha Aiyar* [4]. The point decided is however no less interesting. Where a property subject to a mortgage is sold to the mortgagee for the mortgage amount and certain other sums and the purchaser is put in possession and enjoys the property, is it open to him thereafter to claim against the second mortgagee that he should be paid interest on his mortgage amount ? Their Lordships say no. The point has arisen in several cases of sales in execution of the 1st mortgagee's decree and the Courts have, except in one case presently to be noticed, held that interest could not be recovered after the vendee takes possession of the property. *Dip Narain Singh* v. *Hirar Singh* [5], *Phulmani Chowdrain* v. *Nageshar Prasad* [6], *Gobandham Sastri* v. *Mahabir Singh* [7], *Raghunath Kunwar* v. *Shankare Singh* [8] and *Satnarain Tewari* v. *Sheo Baran Singh* [9]. None of these cases except the last discusses the ground on which they disallow interest to the purchaser. In the last named case, Mr. Justice Mookherjea thinks that the true ground is that the vendee's right being in his character as mortgagee, he is bound to account for the profits. This may be good enough

1. (1883) I. L. R. 9 C. 635.
2. (1914) I. L. R 28 M. 67.
3. (1904) I. L. R. 23 Mad. 239.
4. (1916) 2 L. W. 542.
5. (1897) I. L. R. 19 A. 527.
6. (1911) I. L. R. 33 A. 370.
7. (1912) I. L. R. 34 A. 323.
8. (1913) I. L. R. 36 A. 123.
9. (1911) 14 C. L. J. 500.

where the mortgage is a usufructuary mortgage, but where the mortgage is only a simple one, this argument loses all its force. In fact, in *Rangiah Chettiar* v. *Parthasarathi Naickar* [1], the mortgagee purchaser was disallowed the value of improvements effected by him on the ground that in his character as mortgagee, he was not entitled to be in possession and as such was not entitled to make or claim improvements. The true ground of the disallowance as pointed out by their Lordships in this case is this: subrogation is an equitable right and will be conceded only to the extent that justice requires. But we cannot agree that the analogies relied upon by their Lordships justified the conclusion that in the particular case the total disallowance of interest was justified. It does not seem to be correct to say that the plaintiff agreed to enjoy the profits for the whole money advanced by him. By the transaction, he got no doubt less of profits but he got absolute property; even as against the vendor, he can't be said to have given up his claim for more than the enjoyment of profits as it would certainly be open to him to sue his vendor for damages on the covenant for title. In *Ayathurai Ramtham* v. *Santhu Meera Rowthan* [2], their Lordships allowed the mortgagee purchaser the balance of contract rate of interest after deducting the profits. If the purchaser was only a usufructuary mortgagee previously, it might be the correct rule that the profits should be set off against interest and nothing more should be allowed. Where however the prior mortgage is a simple mortgage, the true equitable rule we should fancy would be to distribute the income between the mortgage money and the balance of the purchase money, and allow the mortgagee his interest at the contract rate deducting thereout the proportionate amount of profits. It should not be open however to the second mortgagee to call upon the first mortgagee purchaser to account for extra profits, if the profits should exceed the interest payable for the obvious reason that he has no claim against the purchaser of the equity of redemption for mortgage money on the ground that the latter has received the profits.

Sankararama Iyer v. Padmanabha Iyer: I. L. R. 38 M. 25.

The view taken in *Dulal Chandra Deb* v. *Ram Narain Deb* [3] and *Ramachandra v. Ganesh* [4] is as observed by Sadasiva Aiyar J.

1. (1896) I. L. R. M. 130.
2. (1907) 31 M. 253.
3. (1903) I.L.R. 31 C. 1057.
4. (1899) I.L.R. 23 B. 382.

more a criticism on the policy of the legislature in enacting S. 24, cl. 4, C. P.C. than a conclusion arrived at upon a consideration of that section and the sections of the Provincial Small Cause Courts Act. The effect of S. 33 of the latter is to constitute courts invested with Small Cause Jurisdiction into Small Cause Courts to the extent they exercise that jurisdiction. There is no conflict between cl. (1) a and cl. (4) of S. 24 C. P. C., because as has been repeatedly held in connection with the question of *res judicata* ordinary courts do not become by reason of S. 16 of the Provincial Small Cause Courts Act, incompetent to try suits of Small Cause nature. The legislature while leaving it to the Local Government to invest courts with Small Cause jurisdiction generally, apparently considered that the high status of the transferring authority afforded sufficient guarantee for the selection of a proper tribunal in individual cases where for reasons personal to the presiding officer (See S. 17 of the Madras Civil Courts Act) or connected with the case a transfer is deemed requisite.

Kamalabai *v.* **Bhagirathibai**: I. L. R. 38 M. 45.

We have the dictum of the Privy Council in *Ramachandra Martanda Waikar* v. *Vinayak Venkatsh*[1] that women succeed only by virtue of special texts, the full effect of which remains yet to be determined. Even applying that dictum, it is not very likely that the stepmother's right could be denied. She is a sapinda and her heritable right to the person that counts in tracing the heirs, viz., the father is recognised by the texts.

Krishnan Nair *v.* **Damodaran Nair**: I. L. R. 32 M. 48. This is but the righting of a wrong perpetrated by a long course of decisions out of deference to an obsolete theory. The reasoning of this decision is certainly fatal to the conclusion arrived at in *Govindan Nair* v. *Sankaran Nair*[2] but that also being a Full Bench decision, it will remain as one of the judge made anomalies of Malabar Law.

Naku Amma *v.* **Raghava Menon**, I. L. R. 38 M. 79.

This is as it ought to be; for otherwise, a member of the Tavazhi for whose benefit the property is given could not look for any benefit from the property and the income of the property

1. (1914) 27 M.L.J. 333 P.C. 2. (1908) I.L.R 32 M. 351 F.B., s.c 19 M.L.J. 350.

must be accumulated in the hands of the Karnavan. Observations in earlier cases as to the duty of the Tarwad Karnavan to maintain cannot be taken as negativing the duty of the Tavazhi Karnavan to provide it when called on to do so. As Mr. Justice Abdur Rahim says, the incidents of Putravakasam property have not been clearly defined and what will be the result of this process of definition whether it will approximate to ordinary joint property with impartibility, single management and corporate succession, or will develop a tarwad within a tarwad of which the great and arbitrary power of the Karnavan is the principal feature. A satisfactory result might be arrived at if in fixing the maintenance of the junior member from the tarwad property his Putravakasam property is left out of account and in fixing his maintenance from the Putravakasham property, his tarwad property is left out of account. The requisite of family residence as has been shown in *Marudevi's case* [1], is only a test of proper conduct and residence at the tarwad house might be taken as a valid excuse for absence from the Tavazhi house and *vice versa.* Mr. Justice Sankaran Nair thought that this Patravakasam was an anomaly and has referred the question to a Full Bench. If the Full Bench agrees with him and holds that Putravakasam property is taken by the donees only as partible property, courts will be relieved from all these speculations and we will have a plain rule instead.

Ramakrishna Chetty *v.* **Subbaraya Iyer**, I. L. R. 38 M. 101. The view taken in this case has since been affirmed by a larger Bench in *Rajah of Pittapur Gani Venkata Subba Row* [2]. There seems to be little difference of opinion as to the principle applicable, the difference being only as to its application to the case in hand. While one set of judges Mr. Justice Abdur Rahim, Mr. Justice Sankaran Nair and Mr. Justice Seshagiri Aiyar think that the section is perfectly clear, the other set of judges, the Chief Justice, their Lordships in this case, Mr. Justice Sadasiva Aiyar and Mr. Justice Kumaraswami Sastri think otherwise. Though the point is by no means clear, on the whole, we should think that the majority are right. The interval between the passing of the Act and its coming into force is too short to raise the presumption of an intention to interfere with vested rights of action. Having regard to the cases cited by their Lordships in this case, it is doubtful if

1. (1911) I. L. R. 36 M. 2C3, s.c. 22 M. L. J. 809. 2. (1915) 29 M. L. J.

the interval theory can be supported on authority. The introduction of a newf eature into the consideration of the question, namely, the interval between the passing of the Act in the Legislative Council and its receiving the assent of the Governor-General is hardly to be commended. The fact that the Act has interfered with vested rights in certain directions could not justify a general presumption to that effect. As for the language in S. 210, there is no difference between the language of that section and of S. 3 of the Limitation Act. It is not clear why these suits are not saved by S. 8 of the General Clauses Act. One aspect of the case referred to by Seshagiri Aiyar, J. but not referred to in the judgments of the other learned judges is about the Revenue Court's jurisdiction to entertain suits for rent for faslis prior to the Estates Land Act. It may be a question whether Revenue Courts have jurisdiction to try such suits at all, though the effect of the new act being not to take away *rights of action* but only to substitute a new forum with rights of appeal and second appeal, there does not seem to be anything against principle in holding that the new Act would apply to them so far as the forum is concerned. S. *Colonial Sugar Refining Company* v. *Irving* [1] but there could not be any question of option as to the tribunal, either the Revenue Courts have the jurisdiction or the Civil Courts but both cannot have it.

Kolathu Ayyar *v.* Ranga Vadhyar, 38 Mad. 114.

Already there is a conflict in this Court on this point. See *Avala Charamudi* v. *Marriboyina Raghavalu* [2]. All the arguments *pro* and *con* except one which we shall presently notice have been considered in these two cases. The question is one of election between what look like two equally tenable contentions. But may it not be argued that a contract which aims at the creation of a future interest contrary to S 14 of the Transfer of Property Act or the general rule of public policy is "of such a nature" that if permitted, would defeat the provisions of that law? An argument like this appears to have caught in *Jagannadha Raju* v. *Balasurya Prasada Rao* [3], where their Lordships held relying on S. 23 of the Contract Act that a contract which provided for the conveyance of a property when the defendant inherited it was bad.

1. (1905) A. C. 369.
2. (1915) 28 M. L. J. 471.
3. (1915) 28 M. L. J. 680.

Chinnayya v. Ramanna, I. L. R. 38 M. 203: 25 M. L. J. 228.

Though on the view ultimately taken by their Lordships the point did not directly arise, this case contains an elaborate discussion of the extent to which a decree may be set aside on the ground of fraud, if perjury by the decree-holder is one of the grounds recognised by law. Both in England and America there seem to be two distinct currents of authorities one in favour of and another against the view that it is a ground the one represented by *Abouloff* v. *Oppenheimer* [1], and the other by *Flower* v. *Lloyd* [2], and *Baker* v. *Wadsworth* [3]. *Abouloff* v. *Oppenheimer* [1], is followed in *Vadala* v. *Lawes* [4], not as being sound in principle but as binding authority. The American Courts regard *Abouloff* v. *Oppenheimer* [1], as proceeding upon grounds peculiar to foreign judgments. The reasons stated by James L. J. in *Flower* v. *Lloyd* [2], for the contrary view have hardly been met. Whether a party and his witness have been lying or are telling the truth is one of the questions necessarily involved in the determination of the questions in the case and in the absence of any wrongful act of the other side which has prevented the unsuccessful party from showing that his opponent has been lying to allow re-agitation of that question is seriously to impair the value of the principle of *res judicata*. Anyhow, Courts ought to refuse relief to parties who could by the exercise of reasonable diligence have prevented the fraud from being perpetrated and have failed to do so. (Cf. S. 19 of the Contract Act). We do not know if it is correct to say that relief on the ground of fraud is discretionary, it is perhaps more accurate to say that in the circumstances mentioned, it is not a case of a judgment which is the result of the fraud of the successful party but one to which his fraud is only one of the contributory causes along with the negligence or fraud of the other side. As pointed out by their Lordships in this case, there is a world of difference between a finding that the defendant had not made out the truth of his case as previously found and a finding that the defendant's case as found previously has not been proved to be true, a distinction which the Lower Courts in this case had failed to bear in mind.

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1. (1882) 10 Q. B. D. 295.
2. (1878) 10 Ch. D. 327.
3. (1898) 67 L. J. Q. B. 301.
4. (1890) L. R. 25 Q. B. D. 310.

NOTES OF INDIAN CASES.

Biswambhar Shaha *v.* Ram Sundar Kaibarta, I. L. R. 42 C. 294.

With reference to Ss. 86 to 90 of the Transfer of Property Act, there existed a considerable diversity of judicial opinion as to the true nature of applications for 'order absolute' and for the supplemental decree (under S. 90) and as to the rule of limitation applying thereto. The state of decisions on the points can be realised from the cases referred to by Justice Mukherjee in *Purna Chandra Mandal* v. *Radha Nath Dass* [1]. The new Code has to some extent narrowed the field of difference, *viz.*, in so far as it has made clear that the applications in question are steps towards decree and not proceedings *in execution.* This has not however sufficed to settle the question of limitation in respect of such applications. It is no longer possible to rely on the argument urged in *Rahmat Karim* v. *Abdul Karim* [2], that these are not applications *under the Code of Civil Procedure.* But the Calcutta High Court nevertheless holds on general grounds that Art. 181 does not govern them. It seems to us too much to lay down as a general principle that no rule of limitation can apply to applications in a *pending* suit or to such as ask a Court to do what it has no discretion to refuse (Cf. *Madhabmani Dasi* v. *Lambert* [3]). Arts. 159 and 178, for instance, refer to applications in pending suits; and the Court has no more and no less discretion to refuse an application for an order absolute or for a decree under O. 34, R. 6, than it has in respect of any application for execution. The principle of decisions like *Kylasa Gounden* v. *Ramasami* [4], seems to us to be only that no rule of limitation can apply to matters in respect of which no application by the parties *is required under the law* or the Court is expected to act *suo motu.* This cannot be said of the matters now in question. The Calcutta cases recognise the expediency of having some time limit in respect of such matters, but they prefer to find it in the Equity rule against laches. As against this it has to be remembered that the scheme of the Indian Limitation Act, is to provide definite periods of limitation rather than follow the English Equity practice—*Cf.* the

1. (1906) I.L.R. 33 C. 867 at pp. 875, 876.
2. (1907) I.L.R. 34 C. 672.
3. (1910) I.L.R. 37 C. 796.
4. (1881) I.L.R. 4 M. 72.

decisions relating to specific performance suits—and it is undesirable to fall back upon an indefinite rule based on 'laches' when the language of Art. 181 is clear and wide enough to cover the particular case. We think the view of the Madras High Court in *Thathara Nannabha Chetti* v. *Kuppal Krishnammal* [1], and *Rama Venkatasubba Iyer* v. *Shanmukham* [2], is more in accordance with the policy of the Act. For the Bombay view, see *Datto Atmaram* v. *Shankar Dattatraya* [3].

Hirji Khetsey & Co. *v.* **B. B. and C. I. Ry. Co.**, I. L. R. 39 B. 191.

In view of the practical certainty of the case going up before higher tribunals, we do not propose to discuss at any length the question of law arising in this case. *Re ipsa loquitur* is a well known rule; but the true scope and limits of the maxim are by no means easy to fix; and in India, a further complication is introduced by the difference in liability made by S. 72 of the Railways Act between Railway Companies and other common carriers. It is however clear that both under the general law as to bailees and under the terms of S. 76 of the Railways Act, when the loss or destruction of goods entrusted to a Railway Company is proved, the *onus* lies on the Company to prove the circumstances necessary to exonerate it from liability. For this purpose, the difference in language between S. 9 of the Carriers Act and S. 76 of the Railways Act seems to involve no change in the law. The question as to what the Company must prove to relieve itself from liability is attended with greater difficulty and it is particularly so in cases in which it is not possible to ascertain the cause of the loss: of course the amount and quality of proof requisite cannot be laid down as a matter of law; but there can be no doubt that the mere fact of loss and the Company's inability to assign the cause thereof are not by themselves *necessarily conclusive* as to liability. It will be still *open* to the Company to prove that it has taken as much care of the goods as a man of ordinary prudence would take of his own goods, under similar circumstances, etc. To this extent we see no conflict between the decisions in

1. (1913) 14 M. L. T. 314. 2. (1913) M. W. N. 867.
3. (1914) I. L. R. 38 B. 32.

The River Steam Navigation Co. v. *Choutmull Dogur* [1], *Lakhichand* v. *G. I. P. Ry. Co.* [2], and the case under notice. We are unable to see the exact point on which Beaman, J., seems to find himself unable to agree with Mr. Justice Batchelor as to the interpretation of the decision in *The River Steam Navigation Co.'s Case* [1]. Reference seems to be made by Batchelor, J., to the discussion of the evidence by the Judicial Committee, not to detract from the weight of any presumptions arising from the fact of the loss being unaccounted for, but only to answer the argument that this circumstance by itself was conclusive as to the defendant's liability. And in holding that the presumption was rebutted, he relies not merely on the evidence as to the care *generally* taken by the company, but as to their carefulness *in respect of the plaintiff's goods.*

Kashinath Parasram *v.* **Gouravabai**, I. L. R. 39 B. 245.

We agree that the demand by banks and companies, of probate or letters of administration even in respect of joint family properties passing by survivorship 'has led in practice to a great deal of theoretical absurdity.' But we do not think that there is anything in law which necessitates the levy of court fee in respect of the *whole* of the joint family property dealt with by a will whereof probate is sought. The *absolute* exemption allowed in *In the goods of Pokurmull Augurwalla* [3] and *Collector of Kaira* v. *Chunilal* [4] is not easy to justify in view of the principles now well established as to the availability of a member's share for his own personal purposes. These cases have been sufficiently commented upon in *In re Desu Manavala Chetti* [5] and the view of the Madras High Court that court fee is payable in respect of the *share* of the testator seems to us reasonable. It is misleading to rely too much on the well-known observations in *Appovier's case*, as though they contain the *whole* law as to the rights of undivided members. A great deal of water has since flowed under the bridge. But curiously enough the learned Judges in the case under notice rely on that case as justifying the levy of court fee on the whole property. Hayward J. says 'what has to be looked at in such cases is the estate actually specified in the will and not the estate which could legally be disposed of by the will.' This

1. (1898) I. L. R. 26 C. 398.
2. (1911) I. L. R. 37 B. 1.
3. (1896) I. L. R. 23 C. 980.
4. (1904) I. L. R. 29 B. 161.
5. (1909) I. L. R. 33 M. 92.

is true; but it does not follow that 'those desiring to establish the factum of the will must pay the full duty leviable' on the property dealt with by the will, unless one accepts the learned Judge's view that it cannot be said of even the least part of the joint family property that it is held by a member 'in trust not beneficially'. We beg leave to point out that there is some confusion underlying this last proposition. It is one thing to say that every member of a joint family has a beneficial interest in every item of joint property; but it is a very different thing to say that a member is so interested in such an item to the *full* extent of its value. It is the latter question that now concerns us. It may be said that some cases countenance the upholding of an alienation by a member of the *whole* of some item of family property, but those very cases clearly proceed upon a principle of special equity in partition, without derogating from the rights of the other members.

There is however one circumstance—not adverted to in any of the cases—which may introduce some complication in the decision of the question of the court fee payable in such cases. As a matter of fact, the joint family consisted of *father and son* in the case under notice as also in the Madras Full Bench Case; but a difference is conceivable between such cases and those where the family consists of undivided *brothers*. In the latter case it can be reasonably held that the deceased brother held the other brother's share without a beneficial interest or general power to confer a beneficial interest, but in the former case, such a view will conflict with decisions like *Fakirchand Motichand* v. *Motichand Hurruckchand* [1], *Jagabhai Lalubai* v. *Vijbukhandas*[2] and *Nunna Setti* v. *Chidaraboyna* [3] holding that the *whole* interest in the family property can be attached or will vest in the Official Assignee in proceedings against the father, for these cases rest on the ground that over the whole ancestral property the father has a disposing power which he may exercise for his own benefit. The recognition by the Legislature in S. 53, C. P. C. that as between father and son, family property may for purposes of execution be regarded as property come to the son, as 'legal representative' would emphasise the distinction.

1. (1883) I. L. R. 7 B. 438.
2. (1886) I. L. R. 11 B. 37.
3. (1902) I. L. R. 26 M. 214.

Abkar Saheb *v.* Sonan Bivi Saiba Ammal: I. L. R. 38 M. 261.

One of the points decided in this case is covered by *Saminatha* v. *Purushothama*,[1] that is to say that the expenses of a suit in which a person posing himself as a trustee unsuccessfully resists another's right to be trustee is not a proper charge on the trust estate. The other point that arose in the case *viz*, the limitation for a suit to enforce a trustee's right to indemnity out of the trust estate for his out of pocket expenses is also covered by authority *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee*[2]. An attempt is made to explain the basis of their Lordships' decision. Mr. Justice Miller thinks that art. 132 is inapplicable because the third column of that article cannot apply as no suits could be maintained at the time the amounts were due for want of a person to be sued. We think this is a sound argument. For the same reason art. 61 is also to be excluded. It is a well-settled principle of law that when the hand that pays and the hand that is to receive is the same limitation does not run. There is precedent for the liberty taken in the decisions with reference to art. 182 of the Limitation Act. Mr. Justice Sadasiva Aiyar bases it also on the peculiar nature of the charge. In this too there is considerable force. A further question that arose in the case and that a more difficult question was as to when limitation commenced. Was it at the date when the trusteeship came to an end, or when it was declared by the Court to have come to an end or when the possession of the trustee terminated? Their Lordships say that at the earliest it could be only at the second of the dates mentioned. Both were inclined to hold that it would be the later date when possession ceased. The ground of their Lordships' decision is the nature of the charge sought to be enforced. The right to actively enforce the charge in their Lordships' opinion arises only when the trustee is unable to himself have reimbursement out of the trust funds. An analogous rule is laid down by their Lordships of the Privy Council in respect of persons in possession under decrees of courts subsequently reversed. *Sakhina Mohun Roy* v. *Saroda Mohun Roy*[3].

1. (1892) I. L. R. 16 M. 67. 2. (1909) I.L.R. 37 C. 229 (P. C.)
3. (1893) I. L.R. 21 C. 142.

The judgment of Mr. Justice Sadasiva Iyer contains some instructive observations as to *de facto* trustee's right of reimbursement. His Lordship makes a distinction between a *de facto trustee in bona fide possession and one wrongfully* in possession and also a distinction between payments out of the income and out of pocket expenses. The distinctions made by his Lordship are fully justified by analogies drawn from cases of executors *de son tort* and trespassers against whom a decree for mesne profits or damages is made. See *The Peruvian Guano Company* v. *Dreyfus brothers* [1] *Dakhina Mohan Roy* v. *Saroda Mohan Roy* [2] and Williams on Executors p. 195. The rule that an executor *de son tort* has all the rights but none of the privileges applies only to the right of retainer and other special rights of the executor and "*plene administravit*" is always a good defence to an action against him. In this country where *de facto* trustees, *de facto* matadipathies, for the matter of that *de facto* poligars even are recognised, there is little reason not to give effect to rules of *Common Justice* to which their Lordships of the Privy Council refer in *Dakhina Mohan Roy's case.*

Vairavan Chettiar *v.* **Avicha Chettiar**: I. L. R. 38 M. 275.

A contract implied in fact is not an implied contract but an express contract; the term implied contract is properly applicable only to contracts implied in law. S. 9 of the Contract Act gives only the definition of an implied promise and not of an implied contract. In the absence of any binding definition of an implied contract, the term may properly be understood in the sense of the English Law under which warranty of authority is such implied contract. The expression misfeasance or malfeasance in Art. 36 is wholly inappropriate to such action. Having regard to the fact that the articles of the limitation Act are enacted with special reference to actions as known to English law, it seems to be a fair conclusion that the term implied contract was intended to include implied warranty of authority.

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2. (1892) A. C. 166. 3. (1898) I.L.R. 21 C. 146.

Muthukrishnier *v.* **Veeraraghava Aiyar**, I. L. R. 38 M. 297.

Though there is much to be said on principle in support of Mr. Justice Sundara Aiyar's judgment, after the recent decision of the Privy Council in *Mulraj* v. *Viswanatha* [1] the point seems unarguable. According to the view of their Lordships of the Judicial Committee hypothecation is an assignment within the meaning of S. 130 Transfer of Property Act. If so, the assignee has the right of suit and the assignor has not. Mr. Justice Sundara Aiyar does not deny that the creditor would be liable if the assignment was one that precluded the other party from suing for well he could not do that in the face of *Shyan Kumari* v. *Rameswar Singh* [2]. No doubt the implication of this view goes further than *Muthuvijia Raghunath* v. *Venkatachellam*[3] would require, and it may be open to argument whether their Lordships' decision does not require the same conclusion as to the incapacity of the mortgagee to sue after a sub-mortgage. Of course, S. 130 does not apply to mortgage-debts and the question will have to be decided on the general principles referred to in *Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai* v. *Venkataehellam Chetti* [3].

The Receiver of the Nidadavole *v.* **Suraparazu**, I. L. R. 38 M. 295.

This case illustrates the general inconvenience of peripatetic Courts but happily, the particular inconvenience can be avoided by the Collectors taking a little thought and naming a person to receive the plaints.

Muthia Chetti *v.* **Suppan Servai**, I. L. R. 38 M. 291.

There is nothing violent in holding that "the date of the passing of the decree" is the date on which it is drawn up. The provision of the Civil Procedure Code that the decree shall bear the date of the judgment is not tantamount to saying that the decree is for all purposes made on that date. In *Annamalai* v. *Clocte* [4] it was held that the date of an order was the date of its

1. (1913) I. L. R. 37 B. 198.
2. (1895) I. L. R. 22 C. 27.
3. (1904) I. L. R. 20 M. 35.
4. (1883) I. L. R. 6 M. 189.

being communicated. Applying the principle of that judgment, the date on which the decree can be said to be passed is the date on which the party could have a copy of it, *viz.*, the day on which it is drawn up. Having regard to the practice of Courts actual communication could not be expected.

Muthusamier *v.* Sree Sreemethamithi Swamyar, I. L. R. 38 M. 356.

This case taken with *Narsaya Udapa* v. *Venkatramana Bhatta* may be taken as settling the law that whereas in the case of improper alienations of trust property, limitation commences to run from the date of alienation, in the case of such alienations by Matadhipathis who have a beneficiary interest in the property, limitation commences only after the death of the grantor and may be put off for the life-time of the successor if he should ratify the alienation. In the absence of such ratification, failure to sue within the statutory period after the accession of the new incumbent may bar the institution itself.

We welcome the timely caution uttered by Sadasiva Aiyar, J., against the blind application of a foreign analogy to these institutions which is more likely to obscure than elucidate their true import. Whether S. 92, C. P. C. applies or not, it will be a grave national calamity if the Courts should be held not to have the power to prevent gross scandals in the administration of the affairs of these institutions. There is no reason why the body of disciples for whose benefit the institutions are obviously intended should not in that eventuality, intervene by suit cf. *Strinivasa Ayyangar* v. *Strinivasa Swami* [1]. *Kailasam Pillai* v. *Nataraja Thambiran* [2].

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1. (1892) I. L. R. 16 M. 31 at 33. 2. (1909) I. L. R. 33 M. 286.

NOTES OF INDIAN CASES.

Monijan Bibi *v.* District Judge, Birbhum, I. L. R. 42 C. 351.

The powers and functions of the Court, under Act VIII of 1890, in respect of the marriage of a ward are by no means easily ascertained. Under no system of law does the court act as match-maker; but there is nothing in the Indian Act which even requires that a ward should be married only with leave of the court. In *Bai Diwali* v. *Motikarson.*[1] one of the learned Judges doubted whether S. 43 of the Act can cover a direction by the court to the guardian in respect of the ward's marriage (but see *Subhadra Koer* v. *Dhajadhari* [2]). It is sometimes suggested that the 'other matters, &c.' in S. 24 may include the marriage of the ward, *Komma Somakka* v. *Pedda Ramiah* [3]—though in the case under notice the learned Judges are not prepared to take that view; but any way, that section only prescribes the duties of the guardian of the person and throws no light as to the power of the court. S. 33 provides for the 'opinion, &c., of the court being obtained by the guardian, only as to 'the management or administration of the property of the ward.' S. 34 (e) directs that the guardian of the ward's property shall under the orders of the court apply the income thereof for the celebration of ceremonies, &c. This seems to be the only way by which the Court in India can exercise any control in the matter of the ward's marriage; and we are therefore unable to agree—whatever the 'desirability' of the court's sanction may be—that in this country 'a ward of court cannot marry without the consent of the court.' We doubt the propriety of importing the rules of English law—however elementary or fundamental—in the face of the omission of the Legislature to reproduce them. It is scarcely necessary to say that the enforcement of the English rule in this country will not be without its difficulties and complications. In the case of persons whose estate is under the Superintendence of the Court of Wards, there is express statutory provision on the point.

Kanchan Mallik *v.* Emperor, I. L. R. 42 C. 374.

In this case the learned Judges lay down and if we may say so, rightly, that in criminal cases, where a general appeal (and

1. (1896) I. L. R. 22 B. 509. 2. (1911) 15 C. L. J. 147.
3. (1911) 2 M. W. N. 519.

not merely a limited one) is allowed by the law, it is the duty of the Appellate Court, as much as of the court of first instance, to be satisfied 'affirmatively that the prosecution case is substantially true and that the guilt of the appellants has been established beyond all reasonable doubt.' It is not proper for the Appellate Court to say that it must accept the conclusion of the trial Court unless the accused is able to establish to its satisfaction that the first court has come to a wrong conclusion. The question is one of far-reaching importance;. and analogies drawn from other systems of law under which there is practically no appeal on 'facts' or where the appellate Court is only a 'court of error' cannot be safely relied on. Even with reference to Indian procedure, a number of dicta of high authority may be found to support the theory that an appellate tribunal should not reverse the decision of the Subordinate Court unless it is satisfied that the decision is wrong and not merely on the ground that the former would itself have come to a different conclusion if the case had come before it in the first instance. Such observations, whatever their soundness, relate generally to civil litigation and cannot with propriety be extended to criminal procedure.

Ram Ranjan Roy *v.* Emperor, I. L. R. 42 C. 422.

We would invite particular attention to the observations of Jenkins, C. J., in this case as to the duty of a Public Prosecutor in the conduct of criminal cases. If, as he says, the duty of a Public Prosecutor is to represent not the police but the crown, what should be the attitude of the court? When will the subordinate criminal courts in India effectually clear themselves of all suspicion on this score? We are greatly indebted to the learned Chief Justice for tracing out a remarkable mistake in the report of Sir Arthur Wilson's remarks in *Empress* v. *Dhuno Kasi* 1. None can help regretting a state of things which should have led Sir Lawrence Jenkins to feel that the treatment of assessors by Sessions Judges in the mofussil is not infrequently anything but commendable.

Abdul Hakim Chowdhury *v.* Hemchandra Das, I. L. R. 42 C. 433.

As illustrated in this case, the language of O. 47, R. 7 C.P.C. is such as to afford room for the argument that the granting of a

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1. (1881) I. L. R. 8 C. 121.

review in contravention of O. 47, R. 4, can be taken exception to only by way of an appeal (whether from the order or from the final decree) to a higher court and not before the very court which granted the review. So far however as proviso (a) in rule 4 is concerned, *viz.*, that a review should not be granted without notice to the other side, any contravention thereof will give rise to an objection *not on the merits* but as to the form of procedure and in view of well established principles of procedure, we agree that the objection (as to want of notice) may be taken in the very court which granted the application for review. It may be pointed out in passing that the language of O. 47, r. 7 is not quite appropriate with reference to cl. (*b*), for in the class of cases covered by it, the objection is not that the *application* is in contravention of rule 4 but that the *admission* of the review is in contravention thereof. This was the language of S. 629 of Act XIV of 1882, but when changing it in the Code of 1908, the inappropriateness seems to have escaped notice.

Upendra Nath Kalamuri *v.* **Kusum Kumari Dasi**, I. L. R. 42 C. 440.

There can be no doubt that the question of the 'extent of liability' is different from that of 'legal capacity.' If certain properties alone of a person are liable for a debt, but not his other properties, it does not follow that he holds them in two different 'capacities.' Take a joint Hindu family. A junior member may be liable for debts incurred by the manager only to the extent of his interest in the family properties; that does not mean that he holds his separate properties in a different legal capacity. They are both his own. So also in the case of an infant partner. Likewise, the differentiation, in the case of a legal representative, between assets derived from the ancestor and properties of his own, is unconnected with any difference of legal character as to the ownership of the two kinds of properties and cases like *Punchanun* v. *Rabia Bibi* [1] have therefore rightly held that the question of the liability of particular property for a particular debt is one between the parties (or their representatives) within the meaning of S. 47 C.P.C. A case of trust stands on a different footing, involving a well known distinction in legal capacity, not merely for purposes of 'liability' but in other respects as well.

1. (1890) I. L. R. 17 C. 711

The relation of a trustee to the trust property is fundamentally different from that in which he stands towards his own property. Hence it is that numerous cases have held that where property alleged to belong to a trust is attached in execution of a decree for a *personal* debt due by the trustee (or *vice versa*), the question of the liability of the property for the particular debt is not one between 'the parties to the suit'. We think there is really no conflict between the two classes of cases; the solution suggested by Justice Beachcroft in this case accords in effect with the distinction pointed out above but the test as laid down by him is perhaps empirical rather than legally correct.

Karmali Abdulla *v.* Karimji Jiwanji, I. L. R. 39 B. 261 (P.C.)

A question may be raised ere long whether in view of the observations of the Judicial Committee in this case, decisions like *Somasundaram* v. *Krishnamurti* [1], and *Kutte Ammu* v. *Purushotam Dass* [2], can be unreservedly accepted. In the Madras cases, a decree against the partner who did not join in the promissory note was refused, even on the footing that the advance was made on account of the joint trade. After holding that the non-executant partner was not liable *on the note*, the learned Judges in the earlier case proceed to say, 'we think there is no evidence of any intention to create any liability otherwise than under the note and that where money is advanced in consideration of a promissory note, it cannot be treated as giving rise to a suit for money lent, independently of the note.' If these remarks are to be broadly interpreted as negativing the liability of the partners in all cases in which one partner becomes indebted under a negotiable instrument which does not on the face of it bind the other partners, it may be difficult to reconcile them with the decision under review. The case is of course treated by their Lordships as being 'truly an action of accounting' and not 'purely a question of liability on the bills.' But the initial liability arose out of Hundis drawn by one of the partners and the Judicial Committee rest their decision on the finding that 'the plaintiff paid and advanced moneys on the Hundies for and on account and for the credit of the partnership.'

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1. (1906) 17 M. L. J. 126. 2 (1910) 21 M.L.J. 526.

NOTES OF INDIAN CASES.

Srinivasa Aiyangar *v.* **Tiruvenkatathaiyangar** I.L.R. 38 M. 556.

Several points of interest arose in this case though on one point there was a difference of opinion.

One question that arose for decision was; when there is a partition between brothers, and sister's marriages are to be provided for, whether all the family properties can be charged therewith or only the self-acquired property of the father. On all principles known to Hindu Law, a distinction between the property of the father and the grandfather seems to be untenable. Though for some purposes there is a difference between them, they are really not different species of property, there are no separate rules of inheritance for them. Though the Mitakshara does make a difference between पैतृकद्रव्य and पैतामह द्रव्य there is nothing to indicate that the injunction in question is restricted to the former; on the other hand the context abundantly shows that the contrary is the case. The Samskaras have to be performed out of the *Samudaya Dravya*, the joint property.

The next question was as to the step-mother's maintenance, as to whether it should be charged only on her son's share or on the whole property. Assuming that the step-mother is not entitled to a share under the text there does not seem to be any answer why as widow of a co-sharer, her maintenance should not be charged on the entire family property. Viramitrodaya which does not include step-mothers among mothers provides for their maintenance under the text relating to maintenance of widows.

But both the Smriti Chandrika and the Sarasvati Vilasa include step-mother among mothers in the text providing for shares to mothers. Those are the commentaries on whose authority a mother's right to a share is cut down to maintenance in this Presidency. The Mitakshara also is understood by the Viramitrodaya to include step-mothers among mothers.

Mr. Justice Sundara Ayyar also does right in pointing out the distinction between the right to account and the right to mesne profits. A minor co-parcener might be entitled to ask the manager as to how he dealt with the family funds which an adult by reason of his presumed participation and acquiescence may not be entitled to; but that cannot give him any right to claim mesne profits.

The other question that arose in the case on which the judges differed was as to whether marriage expenses of the unmarried brothers should be provided for at the time of partition. On this point, reading the texts as they stand, there seems to be little justification for the narrower construction. Neither the text of Yajnavalkya nor the commentary of Vignaneshwara thereon makes any distinction between Samskaras. असंस्कृता भ्रातर समुदायद्रव्येण संस्कर्तव्या: The texts of Brihaspati and Vyasa relied upon by Smriti Chandrika expressly refer to Samskaras other than Upanayanam. Really, there seems to be little justification in Smriti Chandrika for the view that Upanayanam is the only Samskara to be compulsorily provided for out of the family funds. The restricted interpretation the author places on the word *Samskaras* is confined to the text of Narada which casts a duty on the brothers to perform them irrespective of the possession of property. This is how Mr. Krishnaswamy Aiyar, the translator of Smriti Chandrika understands the author (p. 59). The right view to take of these texts is that provision should be made for all the Samskaras which are usually done apart from any question as to whether their performance is compulsory.. Cf. 2 Strange 289. If ones' sense of fairness has anything to do in the matter, it certainly seems equitable that a man who has had the benefit of the family funds for his own marriage should not be permitted to tell his brother that his marriage is not compulsory; that he may with great advantage to his soul be a नैष्ठिकब्रह्मचारि or a सन्यासि (Naishtika Brahmachari or Sanyasi). As Manu says प्रवृत्तिरेषाभूतानां निवृत्तिस्तुमहाफला. (Chapter V, 56). It is natural to marry but may be meritorious not to. But no man has got a right to ask another to perform meritorious acts for his own benefit.

Chidambara Chettiar *v.* **Vaidyalinga Padayachi**: I. L. R. 38 M. 519.

Having regard to the decision of the Full Bench in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [1] it would seem impossible in this High Court to contend that a transaction which requires for its validity a registered deed can be validated on the ground of possession being delivered or money paid. Both those circumstances did exist in the case referred to, and yet the Full Bench

1. (1906) I. L. R. 29 M. 836.

held that the vendor was entitled to recover the land. *Ram Baksh* v. *Mughlani Khanam* [1] and *Karalia Nanubhai* v. *Mansukhram* [2] proceed upon a view opposed to the Full Bench decision. The effect of the Full Bench is that there is no scope for the application of the Equity doctrine of estoppel or part performance in cases where the statute requires a deed for completion of title. Those doctrines may yet be successfully appealed to in cases where the Statute Law does not require a deed. Cf. *Mahomed Musa* v. *Aghore Kumar Ganguli* [3]. Not that in some cases a question of estoppel as understood in the Evidence Act may not arise but no estoppel will arise merely from the fact that consideration has been paid for or restitution in *integro* is not possible. It is difficult to see how in transactions entirely void under the law, any question of restitution can arise. To apply S. 55 to transactions in the nature of exchange is to confuse legal ideas and can in no view be justified, but even in the case of that section, there can be no scope for its application when the transaction is void.

Krishnappa Chetty *v.* **Abdul Khader Saheb**, I. L R. 38 M. 535.

The point that arose in this case is one of first impression and involves an extension of the doctrine of *lis pendens* as hitherto understood. We must confess we feel great difficulty in accepting the conclusion as correct. If on the one side, the analogy of appeal, *Setappa Goundan* v. *Muthaya Goundan* [4], and execution proceedings, *Umesh Chandra Sarkar* v. *Jahur Jatima* [5], are ready to hand, on the other, with even a greater show of reason, the analogy of review might be appealed to in support of the contrary view, Huken Chand *Res judicata* S. 278. It seems to us difficult to make the claim *proceedings* and the *suit* subsequently brought, one proceeding within the meaning of S. 52 of the Transfer of Property Act. The section makes a difference between a suit and a proceeding. Unless the proceeding is a proceeding in the suit as in the case of execution proceedings, it would *prima facie* seem impossible to treat the *proceeding* and *suit* as one and the same *proceeding*. The hardship for which the somewhat heroic remedy is suggested is

1. (1900) I. L. R. 26 A. 266.
2. (1900) I. L. R. 24 B. 400.
3. (1914) 28 M. L. J. 58 (P. C.).
4. (1908) I. L. R. 31 M. 268.
5. (1891) I. L. R. 18 C. 164 (P. C.).

one of frequent occurrence compares for instance arts. 11 and 47 to which obviously the principle of *lis pendens* will not apply.

Venkatapathi Nayanivaru *v.* **Mahomed Sahib**, I. L. R. 38 M. 531.

We think the law has been correctly laid down in this case as to a Judge's disqualification to hear cases. The mere fact that the appellate Judge had when he was Munsiff, tried the case in part could not be a disqualification for his hearing the appeal unless the appeal involved any question as to the correctness of the orders passed by him as trial judge.

Kunhu Kutti Amma *v.* **Mallapratu**, I. L. R. 38 M. 527.

If the decision in the case is based on custom, on which one of the learned judges that decided the case is undoubtedly a great authority, *cadit quaestio*; but if the case is based on any analogy drawn from the Malabar Law, there seems to be good reason to doubt its correctness. It is now established that the Nambudris are governed by the Hindu Law except in so far as it is modified by usage. There is still much vague talk about the peculiarities of Nambudri Law as if it is a *genus* apart. It is one of the old fallacies which die very hard. Granted impartibility, there seems to be little to differentiate it, we do not say this or that School of Hindu Law, but from Hindu Law. A careful analysis of the case in *Vasudeva* v. *Secretary of State for India* [1], will show that this is all what remains of the so-called peculiarities of that law. Neither single managership nor management by the oldest member is a peculiarity of that law. Usage as to marriage by the eldest member alone has since been declared to be merely a social practice and will not preclude the junior members from marrying *Poppi Antarjanam* v. *Jeyyan Nair* [2]. The Kritrima and Dwamushyana forms of adoption and affiliation by women though opposed to the law as extant in the other parts of this Presidency cannot be said to be opposed to Hindu Law and in fact are in accordance with the views held by some other School of Hindu Law. It has also been recently held that the self-acquired property of individual co-parceners descends on their heirs under the Mitakshara law and not on the Illom *Vishnu Nambudri* v. *Akkamma* [3]. Women are said to possess larger

1. (1887) I. L. R. 11 M. 157. 2. (1903) 14 M.L.J. 214.
3. (1910) I.L.R. 34 M. 96.

rights than in other parts of India but the exact scope of those rights have not yet been determined and if they, as a matter of fact, possess them, that would be going back to the old Hindu law. Neither *Nilakandan* v. *Madavan* [1] nor *Govindan* v. *Krishnan* [2], proceeds upon any determination of the customs governing the parties. *Govindan* v. *Krishnan* [2] simply states the fact that there would be no scope for the application of the doctrine when there are brothers of the deceased. There is little analogy between the position of the father and the Karnavan. The person who resembles the Karnavan would be the manager of the Illom or the ordinary Hindu family who is not the father. In neither case is there any pious obligation to pay debts though the rule long stuck to in Malabar that the Karnavan's debt is presumed to be for a binding purpose would if accepted by the High Court have approximated the Malabar Law to Hindu Law as to liability for father's debt. It is difficult to see how the non-liability of the Anandravan for the debts of the Karnavan could furnish useful analogy to justify the exclusion of the *pious* obligation of the son under the Smritis which are as much a subject of veneration to the Nambudris as to the other Hindus. It is quite another question whether this so called civil liability for the debts of the father based on pious obligation is not a creature of judge made law and should not be applied to Nambudris.

The Manager to the Lessees of Sivaganga Zemindari *v.* Chidambaram Chetty, I. L. R. 38 M. 524.

Where the landlord is entitled to collect so much per acre the mere fact that owing to inadvertence, or owing to less scientific methods of survey, he collects less, cannot disentitle him from collecting the proper amount without recourse to the Collector under the provision for enhancement of rent.

Koneti Naicker *v.* Gopala Ayyar, I. L. R. 38 M. 482.

It can by no means be said that a contrary conclusion was not possible in this case. "Signing as agent" and "Executing as agent" cannot make much difference in meaning and it cannot be said that if it were a bond and not a pro-note, a contrary conclusion would not have been reached. Under the English law, there seems to be little difference on the point in question

1. (1887) I.L R. 10 M. 9. 2. (1892 I.L.R. 15 M. 383.

between bonds and pro-notes. But nevertheless, for the sake of uniformity and having regard to the other considerations referred to by Sadasiva Aiyar, J. we are glad that the conclusion was as it is.

Govinda Chetti v. Perumal Chetti, I. L. R. 38 M. 489.

The remarks of Sadasiva Aiyar, J., are none too severe against the practice adopted by some Magistrates of using S. 144 Criminal Procedure Code, in such a way to give themselves a more extended jurisdiction than the Code permits.

Phetma Bibi v. Haji Musa Sahib, I. L. R. 38 M. 491.

This case contains a very luminous exposition by Tyabji, J., of the rules of Mohamedan Law as to succession to Mutwalliship with special reference to hereditary right, but the remarks of Sadasiva Aiyar J. might raise certain amount of alarm among vested interests by his Lordship's strong expressions of opinion against the hereditary principle in the matter of succession to religious offices: There is much to be said for the point of view suggested by his Lordship.

Battie v. Brown, I. L. R. 38 M. 452.

It is certainly an anomaly to hold that though the marriage is dissolved, it is still in force but some such construction was necessary to avoid an *impasse*. A dissolved marriage which invalidates a subsequent marriage is, in a sense, "still in force."

Lodd Govindoss Krishna Doss v. Rukmani Bai: I. L. R. 38 M. 438.

Qui facit per alium facit per se is, no doubt the ordinary rule, but when the section expressly says that the entry should be in the handwriting of the person who makes the payment, there seems to be little scope for the application of this maxims. The utmost concession that is permissible under the circumstances, if at all is that allowed by the Judges, *viz.* when the man is unable to write, he may fix his mark, which is all he can do towards making the entry for payment.

NOTES OF INDIAN CASES.

Channmal Sawmi *v.* **Gangadharappa,** I. L. R. 39 B. 339. (F. B); **Bharma** *v.* **Bhama Gauda,** I. L. R. 39 B. 421; and **Municipal Committee of Nasik** *v.* **The Collector of Nasik,** I. L. R. 39 B. 422.

The opinion of the Full Bench in the first case is disappointingly laconic. The learned Judges content themselves with a negative answer, that decisions on certain points are not preliminary decrees, within the meaning of S. 97, Civil Procedure Code, so as to necessitate an immediate appeal therefrom; they give us no indication of their opinion as to what cases are covered by that section. It has been held in cases like *Kaluram* v. *Gangaram* [1] that there can be no appeal unless a decree is drawn up. (see however *Govind* v. *Vithal* [2] and *Kamini Debi* v. *Promotha Nath* [3] for a different view) and we think, with the referring Judges, that the Legislature has indicated the classes of cases in which a preliminary decree is to be passed. Presumably, as held in the third case noted at the head, these are the cases contemplated by S. 97. A 'preliminary decree' should not be confounded with a decision on a 'preliminary point.' If such a point is decided in favour of the plaintiff, the Court next enters on the merits of the case and there is no decree of any kind at this stage. If on the other hand a preliminary point is decided against the plaintiff so as to bar the further trial of the suit, a decree of dismissal follows and this is a 'final' decree.

Now that the Bombay High Court has gone back upon the dictum in *Narayan Balkrishna* v. *Gopal* [4] as to the meaning of 'matters in controversy' in S. 2 (2) Civil Procedure Code, it remains to be seen whether the other High Courts will nevertheless stick to them (see *Venkata Reddi* v. *Venkata Reddi* [5]. Cf. *Kamini Debi* v. *Promotho Nath Mukerji* [6].)

Dattajirao Ghorpade *v.* **Nilkantrao,** I.L.R. 39 B. 352.

The learned Judges base their ultimate conclusion on the circumstances of the particular case, and we have no quarrel with that; but we cannot help thinking that it will be highly detrimental to the best interests of judicial administration, to give an

1. (1913) I. L. R. 38 B. 331.
2. (1912) I. L. R. 36 B. 536.
3. (1914) 19 C. W. N. 755.
4. (1914) I. L. R. 38 B. 392.
5. (1915) 2 L. W. 519.
6. (1914) 19 C.W.N. 755.

undue extension to the doctrine laid down in the *Valloor case* [1], as to the authority of counsel or pleader to bind the client by his admissions and omissions. It is not uncommon to find a pleader in charge of a case easily fall in with the view of the presiding Judge on a point of law going to the root of the case, and if in that view he takes a particular course as regards the letting in of evidence, it will be seriously fettering the discretion of the appellate Court to say that as a matter of law, the client should be held bound by the course adopted by his pleader and be allowed no further remedy, however erroneous may be the view which led to the adoption of that course.

Javerbhai Jorabhai *v.* Gordhan Narsi, I. L. R. 39 B. 358.

We are not without doubts as to the correctness of the view that the compensation clause in the contract is enforceable though the mortgage itself be invalid in law. Our doubt rests not on any rule of law but on well established principles of construction. A person putting a mortgagee in possession, provided by one of the clauses in the deed that 'if the house should be taken out of your possession, we and our property, &c., shall be liable for any loss, &c., and for the money advanced.' As pointed out in the Tagore case, the terms of a document should be interpreted on the footing that the parties believed the transaction to be operative in law; and it seems clear from the context that the clause above set out referred only to such possession as the mortgagee may get on foot of the mortgage. If the mortgage turns out to be invalid, the mortgagee may have his own remedies under the law, but we do not feel convinced that the compensation clause in the contract can be applied as if it were an independent or collateral covenant. *Kerrison* v. *Cole* [2], and *Payne's case* [3], are not really analogous. The question is not as to the validity of the convenant but as to its scope and meaning. *Ut res magis valeat quam pereat* is no doubt an excellent rule, but not even that will justify a court in putting upon a contract a construction which the parties never contemplated. It is suggested that a mortgage right had been acquired by *prescription*; if so, relief might have been given on foot of the mortgage itself and not merely on the basis of the compensation clause alone.

1. (1902) L. R. 29 I.A. 76, s. c. I. L. R. 25 M. 367.
2. (1807) 8 East 231.
3. (1858) 3 H. and N. 572.

NOTES OF INDIAN CASES.

Kunwar Bahadur *v.* Bindraban : I. L. R. 37 A. 195.

In the light of the recent judgment of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* [1], the decisions of the Madras High Court in *Veerayya* v. *Gananna* [2], *Kalavathal* v. *Thirupathi Pallavarayan* [3], *Ramanna* v. *Annamma* [4], and of the Allahabad High Court in *Bhagavanthe* v. *Lukhi* [5], holding that the cause of action of each reversioner is different would seem to require reconsideration. It seems to be their Lordship's opinion that all the reversioners have their cause of action at the same time, that is, at the date of the alienation when their common interests are jeopardised and though except in special circumstances the remoter reversioners may not sue alone, they may sue jointly with the presumptive reversioner and may continue the suit brought by the presumptive reversioner. Their Lordships look upon suits by reversioners as suits in a representative character, whether their object is to set aside alienations or to set aside adoption. The construction suggested by the Full Bench case of *Chinnavolu Ponnamma* v. *Annamma* [6], would seem to have the support of the Privy Council. The interpretation of art. 125, even as accepted by the later cases, does not prevent anomalies, for instance, a person who as a remote reversioner, might have yet time to sue find himself barred by art. 125 by the death of the nearer reversioner. The fact that some other was the presumptive reversioner at the date of the alienation and that the reversioner that sues was not even in existence at the time would apparently not be a bar to the application of the article. See *Bapanna Venkata Subbarayalu* v. *Bapanna Ratnamma* [7].

Indar Pal *v.* The Imperial Bank, I. L. R. 37 A. 214.

The holder of a pro-note from a Hindu father sued upon the note impleading the father as well as the sons but subsequently

1. (1915) I. L. R. 38 M. 406.
2. (1912) 23 M. L. J. 269.
3. (1905) 10 M. L. J. 229.
4. (1912) 24 M. L. J. 183.
5. (1899) I. L. R. 22 A. 33.
6. (1905) I. L. R. 29 M. 390.
7. (1910) 8 M. L. T. 121.

withdrew his suit against the latter. In these circumstances, could the decree got against the father be executed against the share of the son? That was the question in this case and their Lordships held that the withdrawal of the suit was not a bar to the execution. There was a partition subsequent to the decree which was also pleaded as a bar to the execution, but their Lordships having found, that the partition was a fraudulent and collusive one entered into with a view to defeat the creditor that difficulty was got over. If the right principle on which the Court executes the decree against the father against the son's share in the family property, and there is no doubt that that is the right principle—that the Court is only doing what the father himself could have done, or in the words of Sir Bhashyam Aiyangar—executing the power vested in the father, the creditor would be entitled to proceed against the son's share so long as there is no binding adjudication between himself and the son that the debt is not one which he is not liable in law to pay. Withdrawal of the suit might bar a fresh suit on the same cause of action but does not involve the adjudication of any such question as is referred to above. Similarly, the suit might be dismissed against the son on some technical ground *e. g.*, such as was apprehended in this case, that he was not a party to the note, or even for default. In such cases, there will have been no binding adjudication on the point that is essential for excluding the son's liability and the son's share might be proceeded against. The same cannot be said when a declaration of liability is sought against the son and it is not granted, or the son is made a party and such a relief could have been claimed against him and yet is not claimed. In both these cases, S 11 of the Civil Procedure Code, would seem to import an adjudication against such liability *Ramasami Nadar* v. *Ulaganatha Goundan* [1]. In this view, the correctness of *Yanamandra Papiah* v. *Lanka Subbasastrulu* [2], might be open to question.

We cannot share the doubts of Tudball, J., about the correctness of *Krishnasami Konan* v. *Ramasami Ayyar* [3], if the basis of the jurisdiction of the court to execute the decree against the son's

1. (1898) I. L. R. 22 M 2. (1914) 27 M. L. J. 276.
3. (1899) I. L. R. 22 M. 519.

share is the *power* of the father, that jurisdiction must cease when the power of the father ceases which would be the case when there is a partition. Even then the creditor will not be wholly without remedy. He can bring a suit on the footing of the *decree debt*, *Periasami Mudaliar* v. *Seetharama Chettiar* [1].

Chhabile Ram *v.* **Durg Prasad,** I. L. R. 37 A. 296 : S. 92 C. P. C. requires the consent of the Advocate-General to the institution but not to the continuance of a suit under that section. It is possible to hold that on the death of the party that obtained the sanction of the Advocate-General, the action must abate as is the case with class actions in England when the plaintiffs on record die. If the action can be continued we should think it can be (see *Sivagurnnatha* v. *Ramasami Aiyangar* [2], *Cf. Venkatanarayana Pillai* v. *Subbammal* [3], *Ramdas* v. *Hanumatha Row* [4], it is difficult to spell out of the section need for sanction for such continuance. On principle too, we do not see why the court cannot be trusted to take proper precautions as to the *personel* of the parties that are given leave to continue as much as the Collector or the Advocate-General. As for the existence of a *prima facie case*, that must have been found by the Advocate-General before giving leave to the institution of the suit.

Badan *v.* **Murari** : I. L. R. 37 A. 309.

See 65 cl. (*e*) of the Transfer of Property Act throws upon the mortgagor the duty of discharging prior mortgages on the land. It is inconceivable how it could be open to the mortgagor to set up a prior mortgage when he has acquired it, by inheritance or otherwise, as against the mortgagee. Though there was considerable difference of opinion in England as to the precise circumstances under which merger will take place, when the discharge or acquisition of the prior mortgage is by the owner of the

1. (1903) I. L. R. 27 M. 243
2. (1911) 25 M. L J 630.
3. (1915) I. L R. 38 M. 406.
4. (1911) 21 M. L. J. 952.

equity of redemption when he is not bound to pay it, there was never any doubt that he could not set up the mortgage as a shield when he himself was the person primarily liable to pay it. The intention of the party is material only when there is merely a payment and no transfer of the mortgage security. Whether a party acquiring the mortgage interest by transfer or inheritance can set up the mortgage does not depend upon his intention but is merely a question of law.

Kulada Prosad Deghoria *v.* **Kali Das Naik,** I. L. R. 42 C. 536.

We agree that the principle of construction laid down in this case, *viz.*, that where the language of ancient grants is ambiguous, evidence of usage thereunder is admissible as an aid to construction, is too well settled to be open to question, but we think it desirable to point out that in view of the very lax notions that appear to have obtained in this country till recently, as to the disabilities of persons in possession of endowed properties, it will be unsafe to attach much importance to their conduct in determining the true nature of the endowment.

NOTES OF INDIAN CASES.

Bombay Cotton Manufacturing Co. *v.* Motilal Shivlal, I. L. R. 39 B 386 (P. C).

It is scarcely possible to lay down any rigid rules as to the true function of a court of appeal in dealing with oral evidence. The Judicial Committee have from time to time pointed out that in such a matter, the Court of First Instance enjoys special facilities and that its conclusion should not therefore be lightly set aside. This is a wholesome rule. no doubt, but it must be borne in mind only as a rule of caution and not magnified into a kind of legal presumption. In the case under notice their Lordships felt obliged to point out that 'cross-examination to credit is necessarily irrelevant to any issue in the action' but it is most relevant in a different sense. Any one acquainted with original trials in this country cannot help realising that in recording evidence, there is a curious combination of two conflicting tendencies—to let in a large mass of irrelevant evidence on the one hand and perhaps as a reaction against it, to shut out a certain amount of really relevant evidence. If two eminent Judges of the highest court in the country can err on a matter which their Lordships seem to treat almost as elementary, one need not wonder at the ways of courts in the mofussil.

Motabhoy Mulla Essabhoy *v.* Mulji Haridas, I. L. R. 39 B. 399 (P. C).

This case affords an interesting illustration of the wide scope for the misapplication of the principle of S. 92 of the Evidence Act. Parties pay more heed to the substance or result of the transaction they are entering into and are not careful enough to make it accord *in form* to the requirements of law; and the courts must be assiduous not to defeat their plain intent but to see if it cannot be given effect to consistently with law. On the merits of the case, their Lordships' judgment directs attention to a very familiar problem in Indian litigation. When different versions of a transaction are given by the parties, courts are naturally tempted to hold that if the version put forward by one of the parties is not true, that given by the other must be the truth. Their Lordships rightly disapprove of this process of reasoning. The failure of one side does not absolve the other

party from the duty of proving his case substantively, especially when the onus is on him. Attention may also be usefully drawn to their Lordships' protest against 'admissions' being 'dissected'. If a party seeks to rely on an admission by the other, he must take it as a whole and not merely so far as it is in his favour.

Mohini Mohan Misser v. Surendra Narayan Singh, I. L. R. 42 C. 550.

If the learned Judges had rested their decision on the question of fact, as to the want of probable cause, &c., we should have had nothing to say against it. Nor are we disposed to differ from them in the view that if the 'interlocutory' injunction in the former suit was the basis of the plaintiff's present suit for damages, the cause of action arose when the temporary injunction ceased with the termination of the suit, though by the decree in the suit a perpetual injunction was issued. But in so so far as the case goes further and lays down that a party can have no cause of action on the ground that a suit for a perpetual injunction was instituted against him maliciously and without reasonable and probable cause, and such injunction was obtained in one court, (though set aside on appeal), we venture to think that, in view of the state of authority on the point, the conclusion is too broadly and positively stated. It may be, as Fletcher, J., says, that 'there is no case in the books of a suit for damages against a defendant for maliciously and without reasonable or probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. But is this conclusive?

Take the case of a 'temporary' injunction first: Except *Nand Coomar Shaha's Case* [1], and *Wilson* v. *Kanhya* [2], we are not aware of any reported instance of a suit for damages in respect of an 'interlocutory' injunction. And in the course of his order in *Attorney General* v. *Albany Hotel Co.* [3], it was remarked by Justice North, with reference to the English practice of requiring an undertaking from the person applying for an interlocutory injunction, that 'it is difficult to see how in the absence of such an undertaking the defendant could recover from the plaintiff the damages which were really sustained

1. (1870) 13 W. R 305. 2. (1869) 11 W. R. 143.
3. L. R. (1896) 2 Ch. at p. 699.

by him by reason of the improper order of the court.' Indeed, as early as *Novello* v. *James* [1] it appears to have been argued that but for the undertaking there would be no jurisdiction to award damages. But we are nevertheless inclined to believe that in accordance with well-established legal principles, a remedy by way of action does exist in cases in which an interlocutory injunction is obtained maliciously and without reasonable and probable cause. The Indian Procedure Code from 1859 downwards has *assumed* that such a suit will lie (by providing for the bar of such a suit by an award of compensation in the first suit itself) see S. 96 of Act VIII of 1859 and S. 497 of Act X of 1877; and we are unable to agree that this indication can be lightly ignored. We think that the reasonable interpretation of North, J.'s dictum above referred to, is to hold that the learned Judge was there speaking with reference to a claim for damages, *independent of any blame on the part of the plaintiff* who obtained the interlocutory injunction; for under the English practice, it is now settled that the undertaking entitles the other party to claim damages in all cases in which the plaintiff fails on the merits and not merely, as under the Indian Code (and as, it is submitted, will be the case under the general law) only in cases in which the plaintiff has acted improperly in obtaining the injunction or has instituted the suit without reasonable or probable cause (see *Griffith* v. *Blake* [2]. Seton on Judgments and Decrees, 7th Edition p. 510).

The question seems to be familiar in America, where the system of requiring an undertaking for damages rests not merely on practice but on express statutory provision. In a well-known American textbook, it is observed: "Some conflict of authority exists as to whether a defendant in an injunction suit may by an action on the case recover damages for having been enjoined without cause and the rule has been broadly stated that no such right of action exists and that his only remedy is by suit upon the injunction bond. The better doctrine however seems to be that the defendant's right of action at Common Law is not merged in the remedy upon the bond and that an action on the case will lie. But, to support such action, the plaintiff's pleading must clearly negative the existence of probable cause for the injunction." (High on Injunctions, S. 1648). Reference may also be usefully made in this connection to the

1. (1854) 5 De. G. M. and G. 876. 2. (1884) 27 Ch. D. 474.

analogous case of attachment or arrest before Judgment. Here, too, the English and American practice (in so far as such processes are allowed) seems to be to require an undertaking for damages, but it is nevertheless also recognised that an action will lie for wrongfully and vexatiously suing out an attachment auxiliary to the main suit (See Sedgwick on Damages, S. 467, see also *The Walter D. Walett* [1].) An instructive discussion on the point will be found in *Mangappa Setti v. Ganapati Gounden* [2].

Is there then any reason for making a distinction between a claim for damages caused by an interlocutory injunction and a like claim with reference to a perpetual injunction (dissolved on appeal)? Under the English and American practice no bond or undertaking is given in respect of a final injunction. But this circumstance throws no light on the question of the remedy under the Common law. Nor is there much force in the general argument (referred to by Richardson, J., in the case under notice) that the issue of the injunction being the act of the court, a party should not be held liable in damages for procuring an erroneous decision. The argument can as well be urged with reference to interlocutory injunctions. The theory is no doubt ordinarily correct; and the fact that a court made the order may be an important factor in the determination of the question of malice and want of reasonable cause. But if these facts are sufficiently established, the circumstance that the order was issued by the mistake of the court will be no answer (see for instance *Farley* v. *Danks* [3], and also the observations of Brett, M. R., in the *Quartz Hill Mining Co.'s Case*).

There is certainly more force—especially in view of the very wide provisions of S. 144 of the Code of 1908—in the suggestion that the party injured by the decree granting the injunction should, on its reversal, seek to compensate himself by way of 'restitution proceedings.' With reference to this, however, it must first be observed that the bar of a separate suit for the purpose has been enacted only in the new Code, and the argument would therefore have had no force before 1908 or on general principles. Again, though mesne profits and interest used to be allowed in restitution proceedings even under the old codes, a general provision for 'payment of damages' is

1. (1893) P. 202.
2. (1911) 21 M. L. J. 1052.
3. (1855) 4 E and B 493.

first enacted only in the Code of 1908. We are not aware of any case in which the loss sustained by reason of an injunction granted by a Court of first instance but dissolved on appeal has been claimed and allowed in restitution proceedings. In the absence of authority on the point, we are not without doubts as to whether a claim of that kind can be said to be 'consequential on the *reversal*' within the meaning of S. 144. Justice Richardson seems to think, not. It has also to be borne in mind that proceedings by way of restitution are founded on the mere fact of reversal and have no reference to any question of malice or want of reasonable and probable cause in respect of the institution or prosecution of the suit.

It remains to deal with the larger proposition, founded on the observations of Bowen, L.J., in the *Quartz Hill Mining Co.'s Case* [1], that at the present day 'the bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.' English text-writers generally reproduce the rule thus stated by that learned Judge; and it must be admitted that (in the words of Bigelow) English policy is against giving redress, except in special cases, in respect of civil suits instituted of malice and without probable cause. For an interesting history of the course of English law on the point, reference may be made to the arguments of counsel in *Cotterell* v. *Jones* [2]. It is important however to note the reason of the rule and the exceptions thereto, as recognised by Lord Justice Bowen himself. The reason of the rule is that an unfounded civil action is not the cause of any damage of which the law can take notice and that the defendant who is unsuccessfully sued is sufficiently indemnified by a judgment in his favour which awards him his costs as well. This obviously cannot apply to cases in which the party sued sustains 'special damage' by reason of the suit—apart from the expenses and trouble incidental to the defence of the suit—and Bowen, L.J., recognises this. His view is not to be collected solely from the one sentence that is commonly found cited. He follows it up by saying "Whenever a man complains before a court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must show that the false and malicious legal

1. (1883) 11 Q. B. D. 674. 2 (1851) 11 C. B. 713.

proceedings have been accompanied by damage, express or implied"; and after referring to the 'three sorts of damage' specified by Holt, C. J., in *Savile* v. *Roberts* [1], *viz*, to a man's fame, to his person and to his property, he points out that an ordinary civil action (however malicious) does not necessarily and naturally damage a man's fame or person and as for damage to property, the award of costs must be held sufficient compensation for such damage as the law can recognise to be the 'natural or necessary consequence' of the action (Cf. also *Barnett* v. *Eccles Corporation* [2]). This explanation will not cover cases in which the defendant may, in consequence of an injunction, sustain special damage, for the order as to the costs of the action cannot reasonably be understood to cover such loss also. The maintainability of an action in such circumstances is clearly involved in the judgment of Brett, M. R., in the same case, with which Bowen, L. J., also expresses his general agreement (see also per Buckley, L. J., in *Wiffen* v. *Bailey &c., Union* [3]). The following statement in Addison on Torts (8th Edn., p. 29) seems to us accurately to represent the present position of the English law on the point. 'Such actions are rare owing to the absence of legal damage, but they are not unheard of; and if the process leads to legal damage, an action will lie'. Whether in any particular case the special damage alleged will be held to be the natural consequence of the suit or will be disallowed as only indirect or remote, is another matter. If the damage resulting from the deprivation of the use of one's property by *mesne* process can be held to be within the rule of 'natural and necessary consequence, (see *The Walter D. Wallett*), [4] it is difficult to see why similar damage consequential upon a 'final' process, like a perpetual injunction, should not be within the rule, too.

It may be noted in passing that the rule in most of the United States of America is not so limited as in England. The award of costs in a civil action is there not always regarded as a remedy by way of compensation for injury suffered in consequence of the proceedings and if the other elements, *viz.*, malice, &c., are shown, such injury will support a suit for malicious prosecution even in respect of an ordinary civil action (see American Cyclopaedia. Art 'malicious prosecution').

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1. (1698) 1 Ld., Raym. 374 s.c. 91 Eng. Rep. 1147. 2. (1900) L R. 2 Q.B. 423.
3. (1915) L. R., 1 K. B. 600. 4. L. R., (1893) P. 202.

NOTES OF INDIAN CASES.

Gajanan Balakrishna *v.* **Kashinath Narayan,** I. L. R. 39 B. 410.

In view of the fact that there is no direct authority in support of the adoption of a step-brother, it would have been more satisfactory if the arguments for and against the validity of such an adoption had been fully examined. The decision under notice rests mainly on the ground that several other restrictions laid down by Nanda Pandita have been held to be merely recommendatory; and the learned Judges also hold that the question is practically concluded by the authority of more than one decision of their Court. With all respect, we are unable to agree that the earlier cases referred to by them have really dealt with the arguments advanced in the present case. Neither *Yamnava* v. *Laxman* [1] nor *Ramchandra* v. *Gopal* [2] has any true bearing. They deal with the scope of the exclusion by reference to 'sisters son' and hold that it is confined to the sister's son, the daughter's son and the mother's sister's son. This is supported by the very language of Nanda Pandita himself. In *Ramchandra* v. *Gopal* [2] it is also pointed out that the theory of prohibition with reference to eligibility for marriage—or the marriage theory as Mr. Sarkar conveniently terms it—is not warranted by anything in the Dattaka Mimamsa and is traceable to a mistranslation by Sutherland (See also Sirkar on Adoption Lecture VIII). But, as explained by Muthuswami Aiyar, J. in *Sriramulu* v. *Ramayya* [3] the prohibition of a step-brother's adoption must be traced to the rules relating to the practice of *Niyoga* and has nothing to do with the marriage theory. We are not aware of any case in which this explanation of Muthuswami Iyer, J. or the applicability of the Niyoga theory, as indicating the scope if not the basis of the rule prohibiting the adoption of certain persons, has been examined. We are unable to see any reference to it, much less any discussion of it, in *Ramakrishna* v. *Chimnaji* [4]. And we do not think that a judicial consideration of the bearing of the Niyoga theory on this point is precluded by the observations of the

1. (1912) I. L. R. 36 B. 533.
2. (1908) I. L. R. 32 B. 619.
3. (1881) I. L. R. 3 M. 15.
4. (1913) 15 Bom. L. R. 824.

Judicial Committee in *Sri Virada Pratapa* v. *Sri Brojo Krishore* [1] or by the approval by the same Board in *Puttu Lal* v. *Parbati Kunwar* [2] of the decision of the Allahabad High Court in *Jai Singh Pal Singh* v. *Bijai Singh* [3]. Among text-writers, earlier authors like Strange accept the marriage-theory stated by Mr. Sutherland and do not refer to the Niyoga theory or to the specific instance of a stepbrother's adoption. Dr. Jolly expresses disapproval of the marriage-theory but he also considers that the restrictions indicated by Nanda Pandita are not binding. Messrs. West and Buhler merely note the view indicated in *Sriramulu* v. *Ramayya* [3] Mr. Mayne does not clearly differentiate between the marriage-theory and the Niyoga theory but merely says that 'it is unlawful to adopt a brother or step-brother, etc.,' evidently on the authority of *Sriramulu* v. *Ramayya* [4]. Mr. Sarkar and Dr. Bhattachariya hold opposite views on the question. Mr. Mandlik is of course against Nanda Pandita altogether—and substantially Mr. Ghose too; but this extreme view is untenable in the face of the rehabiliation of Nanda Pandita by the Judicial Committee.

Dayabhai Raghunathdas *v.* Bai Parvati, I. L. R. 39 B. 438.

The learned Judges rightly hold that the provisions of the Guardians and Wards Act do not relate solely to guardians appointed or declared by the Court. While some of the sections are so restricted, there are others which apply to guardians in general, *i.e.*, whether natural, testamentary or appointed by the Court, and S. 25 is one of the latter cf. also Ss. 20, 21, 24, 27, 28. The result of a different view would be that a father would be driven to a suit, as the *sole* remedy, to recover custody of his minor child; for, in view of S. 19 of the Act, he could not get himself appointed or declared guardian of his child under the Act. Whether such a separate suit is permissible or not, it was certainly not the policy of the Act to compel a father to resort to a suit for the purpose.

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1 (1876) I. L. R. 1 M. 69.
2. (1915) 29 M. L J. 63.
3. (1905) I. L. R. 27 A. 417.
4. (1881) I. L. R. 3 M. 15.

Ekradeshwar Singh *v.* **Janeshwari Bahuasin**, I. L. R. 42 C. 582, (P. C.)

The words 'putra poutradi' in grants have ordinarily been held to indicate an estate of *general* inheritance ; but, as pointed out by their Lordships in the present case, they may in special cases, when construed with reference to the object of the grant or the custom under which the grant is made, denote a limited estate ; and in such cases the validity of a grant in terms different from the ordinary law of inheritance must be justified on the ground of custom. With due respect to their Lordships, we cannot help feeling that their conclusion in the case as to the proof of the custom alleged is not easily reconcilable with the standard of proof in such matters, laid down in other decisions of authority. The plaintiff's claim was to apply the custom of exclusion of women to the succession of babuana property that had formed the subject of partition in the collateral branch. There were no prior instances of the particular kind, but their Lordships uphold the custom on the ground (i) that women do not succeed to the main estate, and (ii) that the babuana grants are made only to male members and revert to the main estate on the extinction of male members in the line to which the grant was made. We beg leave to doubt if this is not at best an extension of the custom by analogy. Even on that footing, it seems to us that the case of the main estate is not really analogous to that of a grant therefrom. And, as for the second ground, the revertibility of the grant, in certain contingencies, need not necessarily affect the incidents of the estate granted, so long as it enures. *Cf. Durgadut Singh* v. *Rameshwar Singh*[1] .

Akhoy Kumar Banerjee *v.* **Corporation of Calcutta**, I. L. R. 42 C. 625.

The section of the Calcutta Municipal Act dealt with in this case (S. 228) corresponds substantially to S. 190 of the Madras City Municipal Act, 1904, and in the absence of any authority on the point in this Presidency, the decision in this case will be a useful

1. (1909) I. L. R. 36 C. 943 (P. C.)

precedent. The distinction between a charge and a mortgage, in their respective operation as against *bona fide* transferees for value is well-established, but it is not always easy to decide whether a particular liability imposed on land by the provisions of a statute amounts to the one or the other. The learned Judges affirm, on the authority of English cases, the principle laid down in *Himmat Lal* v. *Vasudev Ganesh* [1] and *Tiruvenkatachariar* v. *Venkatachariar* [2] that in connection with a plea of 'purchase without notice' the onus of proving absence of notice lies on the purchaser. But we fear that the rule as to 'enquiry' as laid down in the present case will make it well-nigh impossible for any transferee to discharge this onus. It seems to us putting the rule too high to say that a purchaser of a house, though he may have no reason to think that the taxes are in arrears, is under an obligation to make enquiries of the municipal authorities to ascertain if there are any arrears of taxes due on the house he intends to buy.

Khagaram Das *v.* Ramsankar Das Pramanik, I. L. R. 42 C. 652.

The question raised in this case is the same as that dealt with by a Full Bench of the Madras High Court in *Muthukrishna Iyer* v. *Sankaralingam Pillai* [3] and the same conclusion is arrived at. It is evident that the learned Judges hold that S. 74 of the Contract Act (as amended) covers the question and that it is not necessary to appeal to any general equitable jurisdiction of the court. After the exhaustive judgments delivered by the learned Judges who took part in the Madras Full Bench case there is little left to be said on the subject.

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1. (1912) I. L. R. 36 B. 446. 2. (1913) 26 M. L. J. 218.
3. (1912) I. L. R. 36 M. 229.

NOTES OF INDIAN CASES.

Guda William *v.* **Guda Karunamma,** 29 M. L. J. 269.

The decision of the majority of the Full Bench in this case does not appear to us to be sound. The question is whether a decree for dissolution of marriage made by the District Judge can be confirmed by the High Court after merely giving notice to the parties and without requiring the petitioner to appear and move for confirmation. Wallis, C. J. and Ayling, J. answer that it can be done and that it is the practice of the Madras High Court to do so.; Sadasiva Aiyar, J. following the view of the Allahabad High Court in *Culley* v. *Culley* [1] and *Forshaw* v. *Forshaw* [2], holds that it cannot be so done and that the petitioner must appear and move for confirmation. Under S. 16 of Act IV of 1869, it is clear that when a *decree nisi* is made by the High Court the petitioner must move to have such decree made absolute. The decree of the District Court is not even a *decree nisi*; indeed it cannot be regarded as operative at all till the hearing of the case by the High Court and its judgment. As the Privy Council pointed out in *Hay* v. *Gordon* [3], "it can scarcely be said that there are two separate judgments, inasmuch as the legislature has not thought it safe to entrust the court below with the power of pronouncing decisions which would be binding if not appealed against, but has made its decision operative only on confirmation by the High Court whose confirmatory judgment is practically the judgment in the suit. Sadasiva Aiyar, J. points out that there are no rules on the point made by the High Court under S. 62 of the Divorce Act. One may point out that the schedule of forms too is silent on the matter. But there can be no doubt that the petitioner who has obtained a *decree nisi* for dissolution has to appear and the case for confirmation has to be heard in every instance. The second paragraph of S. 17 requires it by express terms. Reading S. 17 and the other sections of the Act in the light of the observations of the Privy Council, there can be no doubt that the suit is first tried in the District Court and then is to be continued and heard in the High Court. We think, therefore, that the view of Mr. Justice Sadasiva Aiyar and the Allahabad High Court that the petitioner should appear and move the court to confirm the dissolution is the sounder view. There is neither reason nor any legal principle

1 (1888) I. L. R. 10 A. 559. 2. (1909) I. L. R. 31 A. 511.
3 (1872) L. R. Sup. Vol. I. A. 118.

to justify the view that the Court is bound or entitled to confirm the decree without knowing whether the petitioner desires to proceed with the petition further or not. The requirement in Section 16 that the petitioner should move to make a *decree nisi* absolute, the prohibition against the High Court confirming the decree of the District Court before six months, the terms of Section 17 requiring that there should be before the High Court a case for confirmation and that it should be heard and the principle that the court has no power or jurisdiction to dissolve a marriage if the parties do not desire it though it has the amplest power to refuse to decree dissolution in cases of collusion are, it is submitted, decisive against the correctness of the view taken by the majority of the Court. That there is no provision for giving notice in S. 17 and that the rule-making power under S. 62 is to be exercised consistently with the provisions of the Code of Civil Procedure only tend to establish the soundness of the view taken by Sadasiva Aiyar, J. and by the Allahabad High Court.

Lastly it is a question really not of practice but of the jurisdiction of the High Court. With reference to the remarks of the Chief Justice that the practice of the Madras High Court settles the matter, we would only refer to the observations of the Privy Council in *Palmer* v. *Hutchins* [1] that "no practice of the High Court can confer upon it any power or jurisdiction beyond that which is given to it by the Charter or law by which it is constituted." We do not know why the rule making power under Section 62 of the Divorce Act has not been (as it appears) exercised by the Madras High Court. The Indian Legislature often confers by various enactments rule making powers on the High Courts which unfortunately are seldom exercised and when exercised, the rules are not drafted with the requisite precision and legal imagination with due regard to the convenience of the litigant public and the necessities of litigious business.

Budhu Singh *v.* **Laltu Singh,** 29 M. L. J. 434 (P. C.)

The decision of the Privy Council in the above case is a very important one on a vexed question of inheritance and upsets what has been a settled rule of inheritance in the Madras

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1. (1881) L. R. 6 A. C. 619.

Presidency for the last thirty years. We think the decision is if we may say so, sound and is more consistent with the spirit of the Mitakshara and its scheme of succession than the view which was taken by Turner, C. J. and Kindersley, J. in *Surayya Buktha* v. *Lakshminarayan* [1], with the approval of Mr. Justice Muthuswami Aiyar. The view of the Madras High Court was that the brothers' grandson does not take after the brother's son, but the inheritance at once ascends on failure of the brother's son to the paternal grandmother and that the words "brother's sons" "uncle's sons" did not include brothers' grandsons or uncles' grandsons. The contrary view has been maintained in Allahabad in *Kalian* v. *Ramchander* [2], and this has now been approved by the Privy Council as being the correct interpretation of the Mitakshara, thus settling the law for all the Mitakshara jurisdictions.

The question has no doubt been complicated by opposite views being taken by the Smriti Chandrika and the Subhodhini on the one hand and Apararka, Varadaraja and Nanda Pandita on the other. The principal and indeed the only difficulty has always been the reference by Vignaneswara to the compact series of heirs (in Mitakshara Ch. II. Sec. V pl. 2) coupled with the omission in the Mitakshara to refer to any competition between nephews and their sons in Ch. II Sec. IV pl. 7 & 8. The solution of the difficulty however turns more on what is the meaning of the word "*Putra* or "*Suta*" in the particular context. There can be no doubt that the words are capable of the extended signification which the Privy Council have given to them. The express mention of "sons and other descendants" in Ch. II Sec. 1 pl. 3, the technical and decisive significance of the word "*Aputra*" in Yajnavalkya's Smiriti and the wide meaning of the word '*Santhana*' in Ch. I Sec. V pl. 4 are sufficient indications of the view of the Mitakshara.

We welcome the judgment of Syed Ameer Ali as a learned, anxious and careful pronouncement on the important question and as an illustration of the recent tendency to get at the true meaning of Hindu Law texts unhampered by supposed considerations of *stare decisis* which on a close scrutiny will often be found to rest upon pure error whether of translation or of imagination. *Stare decisis* in matters of Hindu Law common to all

1. (1881) I. L. R. 5 M. 291. 2. (1902) I. L. R. 24 A. 128.

the provinces should be invoked more to produce uniformity and soundness than to perpetuate diversity and the dark age of the Hindu Law before it has received the illumination due to the revival of Sanskrit letters. A great deal no doubt can be said in favour of the opposite view which has been so forcibly and so well set forth by Benson and Abdur Rahim, JJ. in *Chinnasami Pillai* v. *Kunju Pillai* [1]. But the whole basis of that as well as of the earlier decision in *Surayya Buktha* v. *Lakshminarayana* [2] rests upon the Smriti Chandrika whose narrow views especially on the topic of Stridhanam have been already rejected by the Madras High Court. Though the question whether the whole line of each ancestor inclusive of his 6th descendant should be exhausted before the inheritance ascends to the line of a higher ancestor is left open by the Privy Council, there can be no doubt that Mr. Harrington's view is an extreme one and the line must be limited to three descendants of each ancestor. And the inclination of the Privy Council seems to favour this view. Nor do we think that the Privy Council have laid down any erroneous doctrine when they say that spiritual benefit cannot be altogether excluded from consideration as a test of propinquity, where other things are equal. The principle of an attenuated propinquity according to the Mitakshara has been erected into a fetish and has been pushed to such an extent as to make the Mitakshara school of inheritance more illiberal and artificial than the Dayabhaga school. After all, the value of any table of inheritance must depend on its close correspondence with ties of natural affection and blood as recognised by the community and we are glad the decision of the Privy Council in question has interpreted the Mitakshara aright and in conformity with progressive rather than reactionary tendencies.

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1. (1910) I. L.R, 35 M. 152 : 21 M.L.J. 2. (1881) I. L. R. 5 M. 291.

NOTES OF INDIAN CASES.

Garden Reach Spinning & Co., v. Secretary of State for India. I. L. R. 42 C. 675.

In so far as the learned Judges, *in the exercise of their discretion*, refused to admit the additional evidence tendered in appeal, we have nothing to say; but with reference to their observations as to the jurisdiction and power of the Appellate Court to admit additional evidence, we beg leave to say that they place an unduly restricted construction upon the language of O. 41 R. 27 C.P.C. We would, to begin with, observe (in spite of *Krishnama* v. *Narasimha* [1]) that the language used in *Kessowji Issur* v. *G. I. P. Railway Co.*, [2], should not be pressed too far. The circumstances of the case were peculiar; the Appellate Court had, without assigning any reason, practically reversed the order of the Trial Judge refusing a review, to admit the additional evidence. And their Lordships rightly held that the main portion of S. 568 (b) of the Code of 1882 did not authorise that course. It was not necessary for them to deal with the scope of the provision about 'any other substantial cause' in that section, and the reference to S. 623 in the judgment does not, it is submitted necessarily imply that in the event of the discovery of new evidence after decree, the only course is to apply for a review and that no steps can be taken to get such new evidence admitted in appeal. It must be borne in mind that a Court of Appeal in India is not a mere Court of Error whose function is only to say whether or not, the first Court came to a right conclusion on the materials before it As pointed out by Sadasiva Aiyar, J. in *Audiappa Pillai* v. *Muthukumara Tevan* [3], it would be anomalous to hold that the Appellate Court can *after the disposal of the appeal* admit newly discovered evidence on review, but cannot admit such evidence in the appeal itself. See also *Venkatachala Pillai* v *Ranga Pillai* [4]. The suggestion of Abdur Rahim, J. in *Subba Naidu* v. *Ethirajammal* [5], that the 'substantial cause' referred to in the section should be 'ejusdem generis' with the two specified in the preceding portion of the section will practically nullify this comprehensive provision and the view has not generally met with approval in this Court.

1. (1908) I. L. R. 31 M. 114. 2. (1907) I. L. R. 31 B. 381 P. C.
3. (1912) I. L. R. 36 M. 477. 4. (1914) 28 M. L. J. 334.
5. (1911) 22 M. L. J. 14.

(See *Audiappa Pillai* v. *Muthukumara* [1] and *Kamesvarappa* v. *Chelapathi* [2].

Further, even if the judgment in Kessowji Issur's case is to be read as pointing to the remedy by way of review as the only course available in the circumstances then in question, it seems to us there is much force in the contention advanced in the case under notice that that principle cannot apply to a case where the new evidence *came into existence after the decree of the first Court. Cf. Koragiri Venkatasubbamma Row* v. *Vellanki Venkatarama Row* [3]. The learned Judges leave that argument unanswered.

As to the *time* when additional evidence is to be tendered in appeal, the practice, at any rate in this Presidency, is to apply by petition beforehand, though the petition is generally dealt with by the Court when hearing the appeal. The Privy Council no doubt (in *Kessowji Issur's case*) comment on the fact that 'the additional evidence was ordered not after the appeal on the merits had been heard..............but on special and preliminary application' and they proceed to observe that the legitimate occasion for S. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. But this again, it is submitted, must be understood with reference to the fact that their Lordships were there dealing with the scope of Cl. (b) of S. 568 which speaks of the 'Court requiring'—not of the parties tendering—such evidence. It would, for instance, be unreasonable to apply that limitation to the first case provided for in the section, *viz.*, where the Lower Court 'has refused to admit evidence which ought to have been admitted'; and there is no more reason why the condition should necessarily apply to cases in which the Appellate Court allows additional evidence to be produced before it 'for other substantial cause.' It may be that applications for the admission of new evidence on appeal can be conveniently or preferably dealt with, when the Appellate Court is hearing the appeal; but it is a very different thing to say that the Court has *no power* to deal with such applications at any other time.

Kochu Rabia *v.* Abdur Rahman, I. L. R. 38 M. 589.

While we share the difficulty felt by the learned referring Judges in reconciling the decision of the Full Bench in *Randu-*

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1. (1912) I. L. R. 36 M. 277. 2. (1914) M. W. N. 864.
3. (1900) I. L. R. 24 M. 1 (P. C.)

purayil Kunhisore v. *Noroth Kunhi Kannan* [1], with the decisions in *Sri Mana Vikraman* v. *Ananda Pathas* [2], and *Paru Amma* v. *Moothordu* [3], we do not equally share their doubts as to the correctness of these decisions. There is an essential difference between contracts that limit the right of the tenant to make improvements and those that merely regulate the amount of compensation payable to him. As the question as to the amount of compensation would arise only at the date of eviction there is no question that *prima facie* the Act would be applicable to every case of contract before the act whether the parties acted on the faith of the existing law or they expressly fixed the amount of compensation. There is no reason why any distinction should be made between these two cases. In either case, the expectations of parties are equally disappointed. If justification is sought for in any rule of policy, that justification would equally avail in either case. These cases are analogous to cases where new statutes are passed enabling Courts to relieve against forfeiture or other oppressive terms. In *Kadir Moidin* v. *Nepean* [4], the Privy Council thought there was nothing wrong in applying the rules of the Transfer of Property Act as to accounting between mortgagor and mortgagee to a case to which the Act did not apply. It is quite otherwise in the case of the right to *make improvements*. In cases where the contract prohibits the making of improvements, to allow compensation is to annex a new incident to the contract. The Act nowhere confers a right to make improvements; it proceeds upon the assumption that there is such a right. But where the assumption is not justified the Legislature has come to the rescue by providing in S. 19 that the Act shall not apply to such a case.

Vasudeva Aiyar *v.* The Negapatam Devastanam Committee, I. L. R. 38 M. 594.

The distinction between a case where a power is vested in an officer as a Court and those where it is vested in him as a *persona designata* is somewhat fine and one is never quite certain that the distinction is correctly made in any particular case. In *Vijia Raghava Pillai* v. *Theagaraya Chetty* [5], a somewhat analagous case the Presidency Magistrate acting in matters of Municipal election was held not to be subject to the revisional jurisdiction of

1. (1908) I. L. R. 32 M. 1.
2. (1910) I. L. R. 34 M. 61.
3. (1912) 22 M. L. J. 221.
4. (1898) I. L. R. 26 C. 1. (P. C.)
5. (1914) 27 M. L. J. 227.

the High Court and curiously enough *Meenakshi* v. *Subrahmanya* [1], (a case of election of a committee member) was relied upon. Judging from the view their Lordships in that case took of the case in *Meenakshi* v. *Subrahmanya* [1], their Lordships seem to be opposed to the view taken in this case as to the powers of interference of the High Court. Analogies of non-judicial bodies entrusted with judicial functions can afford little help in the matter. To prevent a hasty leaning to one side or other, it may also be advisable to bear in mind the observations of the House of Lords in *Stephens* v. *Theatres* [2]. Where by a statute certain matters are referred to a court with nothing more, the necessary implication is that the court will determine the matter as a court; and if an appeal is open ordinarily from the decisions of that court, an appeal will lie in such cases also. This principle has been applied so as to give a right of appeal from the decrees of the District Court in appeals from Revenue Courts *Veeraraghavalu* v. *Venkatanarasimha* [3], *Venkataramier* v. *Vythilinga Thambiran* [4]. Though the *personnel* of the officer presiding may have been the motive for the power being entrusted to the Civil Court under S. 10. nevertheless the entrustment is to the Civil Court and not to the District Judge. But then revision may be excluded also on the ground that the function exercised by the court is a non-judicial one. Cf. *Ko Tha Hnyin* v. *Ma Hnin* [5], *Sivagami Achi* v. *Subramaniya Aiyar* [6]; where an appeal was held not to lie on the ground that the order though in execution and between parties was an administrative one. Though the observations of their Lordships in *Meenakshi* v. *Subrahmanya* [1], may not be authority for excluding revision on the ground that the tribunal is a non-judicial tribunal, they may be authority for doing so on the ground that the function is non-judicial or administrative one.

As regards the point decided in the case, it is certainly an anomaly that it should be in the power of the Committee by their default to deprive the public of their right of election but there is nothing to prevent the Judge from adopting in his discretion the same procedure as provided for in the case of elections by the Committee.

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1. (1886) I. L. R. 11 M. 26.
2. (1913) A. C. 546.
3. (1914) I. L. R. 37 M. 443. (P. C.)
4. (1913) I. L. R. 38 M. 655.
5. (1918) I. L. R. [illegible] C. 717. (P. C.)
6. (1903) I. L. R. 27 M. 259.

NOTES OF INDIAN CASES.

Afzal Begam *v.* Akbari Khanum : I. L. R. 37 A. 326.

It is one thing to say that the court should not except on very special grounds permit the withdrawal of a suit pending an appeal so as to prevent the other party from having the fruits of his victory, but it is quite another thing to say that the Appellate Court has no power to permit the withdrawal of the suit. Yet that is what was decided in *Choragudi Chinna Kottayya* v. *Raja Varadaraja Appa Rao* [1]. The Allahabad High Court in the case under review declined to unsettle the course of practice in that Court settled by *Ganga Ram* v. *Data Ram* [2]. The practice in our Court also was similar and it is somewhat difficult to see what induced their Lordships to unsettle the practice here.

We must confess we are not convinced by the reasoning in *Choragudi Chinna Kottayya* v. *Raja Varadaraja Appa Rao* [1], which seems to us to be highly artificial. For one thing, S. 107 gives the Appellate Court all the powers that the first Court has. A party may or may not have the power in appeal, which he has during the pendency of the suit but that cannot cut down the powers of the Court. In *Gregory* v. *Dooley Chand* [3] Sir Barnes Peacock felt no difficulty in holding that the Appellate Court had that power. It has for instance been held that the rules as to compromise (O. 23 R. 3) and as to addition of parties (O. 1 R. 10) apply to appeals though the reasoning adopted in this case may in part apply to those cases as well. Under the English Practice an action may be discontinued even after judgment though only with leave of the Court. See *In re Alpha Company, Ltd.* [4].

Abdul Majeed *v.* Khirode Chandra Pal, I. L. R. 42 C. 690.

While we fully appreciate the view that 'the exploitation of the necessitous, of the careless and inexperienced is a trade to be extirpated' and that 'it is the duty of the Courts to enforce the letter of the law against obviously harsh and unconscionable bargains,' we must also emphasise the well-known maxim that

1. (1914) 27 M. L. J. 44.
2. (1886) I. L. R. 8 A. 82.
3. (1868) 14 W. R. 17 (O. J.)
4. (1903) 1 Ch. 203.

Courts should not be tempted, even by hard cases, into laying down bad law. The power of the Court under S. 74 of the Contract Act is one thing; the question of 'undue influence' within the meaning of S. 16 of the Act is a different thing; and mistakes are inevitable, if Courts should wrest out of their context observations found in cases dealing with the former question and apply them to cases raising the latter. We must also point out that the scope of S. 16 of the Contract Act is not co-extensive with that of the English Money Lender's Act. With all respect to the learned Judges, we feel grave doubts as to whether the circumstances of the case under notice justified them in interfering in second appeal and finding 'undue influence' as a matter of fact. In view of authorities like *Dhanipal Das* v. *Raja Maneshar Bhasksh Singh* [1], and *Sundar Koer* v. *Rai Sham Krishnan* [2], the principal question in connection with the application of S. 16 of the Contract Act, would seem to be, 'Is there anything in the position of the parties to show that one of them was in a position to dominate the will of the other'. Urgent need of money on the part of the debtor is not sufficient of itself to bring a case within the section; and as for the transaction being hard and unconscionable, cl. (3) of the section takes note of it only if, *in addition thereto* one party is in a position to dominate the will of the other. An excessive rate of interest, if unexplained, may of itself be evidence that the transaction is an unconscionable one *Samuel*, v. *Newbould*[3], and it would also be an important fact in leading to an inference on the question of the position to dominate: but it is too much to say that it raises a 'presumption' of undue influence which requires to be rebutted. *Muthukrishna Iyer* v. *Sankaralingam Pillai* [4], deals only with S. 74 of the Contract Act and has nothing to say about the doctrine of 'undue influence'. As regards *Kesavulu Naidu* v. *Arithulai Ammal* [5] we are unable to agree with the interpretation sought to be placed on it by the learned Judges of the Calcutta High Court. As we read the judgment, Sir Arnold White, C. J. held that there was no evidence to show that the will of the executant was dominated by anybody and not that the presumption of undue influence was rebutted. Sankaran Nair, J. no doubt puts the case more strongly in favour

1. (1906) I. L. R. 28 A. 570. 2. (1906) I. L. R. 34 C. 150.
3. (1912) I. L. R. 36 M. 229. 4. (1906) L. R. A. C. 461.
5. (1912) I. L. R. 36 M. 533.

of 'undue influence', but it is clear that he felt pressed by the fact that "the debtors were women who were not able to enter into the transaction themselves", and he too lays stress on the necessity of the Court coming to a conclusion as to the 'position of the parties', apart merely from any inference that may arise from the excessive rate of interest. We do not think that either of the learned Judges can be said to have laid down that a 'presumption of undue influence' arises from the unconscionable nature of a bargain.

Secretary of State for India v. Kirtbas Bhupati Harichandan Mahapatra. I. L. R. 42 C. 710 (P. C).

Their Lordships here re-affirm the view indicated in some of their early decisions that in the case of permanently settled estates, the Zemindar has the *prima facie* title to the full enjoyment of every parcel of land within the ambit of the Zemindari and that if in respect of any such land Government should claim a right of resumption, the onus lies upon Government to show that the settlement was made subject to reservations in respect of the land sought to be resumed. We cannot help remarking that many an act of the Government both, executive and legislative, in recent times cannot easily be reconciled with this view as to the scope and effect of the settlement.

Re. Nagappa Thevan I. L. R. 38 M. 602.

"Delegatus non potest delegare" is a trite but useful maxim. It seems to have been lost sight of by the Local Government and the Collector in this case. It is a bit surprising that the mistake should have occured the delegation being of a discretion which involved serious responsibility.

Suryanarayana *v.* **Patanna**, I. L. R. 38 M. 608.

With all deference, on the question of onus of proof, we should prefer the view taken in *Indety Chinna Nagadu* v. *Potukanchi Venkatasubbayya* [1], *Veerabhadrayya* v. *Sonti Venkanna* [2], and *Jagannathacharyulu* v. *Kutumbarayudu* [3], As pointed out in those cases there may be a presumption that an inam ordinarily is only a grant of the Melwaram but there is no justification for the presumption that the grant was made to a person who was not the owner of the kudivaram. There is a well marked distinction in this matter between Zamindaries and Inams. In the case of Zamindaries except with regard to waste lands and private lands, there could be no pretence that the Zamindar was the owner of anything but the melwaram. While the history and the peculiar conditions of Zamindaries justify the presumption that they are nothing more than the sovereign's representatives, owing to the continuation generally of the title in the same family and the comparative opulence of the class the grant of kudivaram rights to the occupant even where yearly leases had taken the place of permanent rights worked no great hardship. In *Chekatti Zamindar* v. *Ramasooru Dhora* [4], the general practice in Zamindaries was considered to justify not only the presumption of occupancy rights in immemorial tenants but also a presumption that even newly admitted occupants had similar rights. The conditions of Inams are entirely different and there was also no parallel course of decisions in respect of them. In *Venkatacharlu* v. *Kandappa* [5], what was decided was that the Inamdar if he wanted to eject a tenant, should strictly prove his right to eject; in other words the Court refused to draw presumption in favour of yearly tenancy. If for any reason, the tenant had to prove that he had occupancy right, the Court would in the absence of evidence, have similarly rejected his claim. In *Natesa Gramani* v. *Venkatarama Reddi* [6], their Lordships refuse to apply the rule laid down in *Cheekatti Zamindar* v. *Ramasooru Dhora* [7], with regards to newly admitted tenants to Inams. Introduction of a tenant has been in some

1. (1910) M. W. N. 659.
2. (1913) 24 M.L.J. 659.
3. (1914) 27 M. L. J. 233.
4. (1899) I.L.R. 23 M. 318.
5. (1891) I. L. R. 15 M. 95.
6. (1907) I.L.R. 30 M. 502.
7. (1899) I. L. R. 23 M. 318.

cases, held to be sufficient proof of Kud-varam right in the Inamdar. It is doubtful whether even in the case of post settlement Inams, the invariable presumption of grant of occupancy rights would have been justified. Minor Inams have never been held to come within the rule and have been wholly excluded by the Act. Having regard to the language of Sec. 3-2 (d) and the general rule as to burden of proof as to jurisdiction and more especially to the considerations above referred to, the preferable view seems to be that taken in these decisions. The practice of the Brahmin communities in no part of the Presidency justifies the inference that they could not be the cultivators of the soil. On the other question in this case, namely whether surrender or abandonment amounts to acquisition we should think the argument of Sadasiva Aiyar J. based on S. 6 is sound and the two must be mutually exclusive. The terms "surrender" and "abandonment" are not defined anywhere in the Act though the term "surrender" is used in S. 187 cl. (b) as an equivalent of relinquishment under S. 149 thereby clearly indicating that it is not used in the sense in which that term is used in S. 111 of the Transfer of Property Act. In other words it is not used in the sense of a bilateral act but only in the sense of a unilateral act. The term "abandonment" occurs nowhere else in the Act. It is used in the Bengal Tenancy Act to indicate relinquishment by the tenant inferred from his quitting or alienating the holding. Having regard to the connotations of these terms it is possible as pointed out by Sheshagiri Aiyar J., in *Venkata Sastrulu* v. *Sitaramudu* [1] that surrender where it is a bilateral act may amount to an acquisition, notwithstanding the use of the term in S. 6. Surrender and abandonment in so far as they are not bilateral acts can hardly be styled modes of acquisition; they are rather modes in which the tenant's interest may be extinguished.

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1. (1915) 26 M. L. J. 585.

Muthu Sastrigal *v.* **Viswanatha Pandara Sannidhi, I. L. R.** 38 M. 660.

"Of things that do not appear and things that do not exist the reckoning in a court of law is the same" *Seaton* v. *Burnand* [1]. If so, an unstamped pronote does not exist and why should the court not ignore the making of it and give a decree on the liability that arises by reason of the receipt of the money? It is certainly inconsistent to rely on the note for the purpose of repelling the claim based on the receipt of money while ignoring it when the claim is based on a pre-existing cause of action and seems to be opposed to the plain words of S. 35 of the Stamp Act which prohibits its being *acted* on for any purpose. If the section had simply said that unstamped documents shall not be admitted in evidence, there might have been some scope for argument based on the language of S. 91 of the Evidence Act which speaks only of the *terms* of contracts and not of their existence, though the correctness of the argument is open to considerable doubt. But as the section stands, it is certainly not permissible to the court to base its judgment on the existence of the note.

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1. (1900) A. C. 135.

NOTES OF INDIAN CASES.

Bal Gangadhar Tilak *v.* **Shrinivas Pandit,** I. L. R. 39 B. 441 (P. C.)

It is alike refreshing and encouraging to come across instances, now and then, of justice ultimately obtained at what, according to ancient theory, is held to be the 'fountain of justice'; and by general consensus of opinion in this country, the present seems to be an instance of the kind. Judicial authorities in India, both high and low, will it is to be hoped sufficiently realise the need, so forcibly pointed out in the judgment under notice, for a due observance of established rules of procedure. On the point arising under the Hindu law of adoption their Lordships' decision in this case finally establishes that even among Brahmins, *Dattahomam* is not essential for the validity of an adoption within the same *gotra.*

Timangowda *v.* **Benepgowda,** I. L. R. 39 B. 472.

Whatever equities may arise in cases in which a person entitled to a sale of property has paid the consideration therefor but has not obtained a registered sale deed as required by law, there need be little hesitation in agreeing with the conclusion in the present case that a person who has a mere contract in his favour and done nothing in pursuance thereof cannot resist the legal owner's claim to possession. The observation of the Judicial Committee on this point, in *Immudipattam Tirugnana* v. *Periya Doraisami* [1], is certainly not easy to get over, but a long line of decisions of that Board, of which one of the most recent is that in *Mulraj Khatau* v. *Viswanath Prabhuram Vaidya* [2], referred to in the Judgment under notice clearly recognise that the English rules of equity cannot prevail in the face of express provisions of the Indian Statute Law. The extent to which their Lordships are prepared to go in the strict enforcement of statutory provisions is shown by their recent decisions under the Registration law holding that even as between the parties themselves and in spite of the acquiescence of the executant a completed transaction is unenforceable because of what one might otherwise be disposed to consider to be mere 'irregularities' in registration, such as presentation by a person with defective authority or registration

1. (1900) I. L. R. 24 M. 37. 2. (1912) I. L. R. 37 B. 198.

in a wrong office. This attitude is in marked contrast to that of the English Courts in the early days in working the Statute of Frauds and is sufficient to make one pause before importing equitable considerations into the operation of Indian statutes.

Vasudeo Raghunath *v.* **Janardhan Sadashiv**, I. L. R. 39 B. 507.

On the finding of the Courts below, the question before the High Court was whether a transfer in fraud of creditors could be avoided by the auction-purchaser in an execution-sale held at the instance of a creditor, when the creditor himself had not taken steps to get the sale avoided under S. 53 of the Transfer of Property Act. The learned Judges have easily come to the conclusion that the auction-purchaser not being a 'creditor' himself nor a 'subsequent transferee' in the sense contemplated in S. 53, cannot have the fraudulent sale set aside. We cannot help feeling that the point has not been sufficiently discussed.

It seems to us necessary for the present purpose to draw a distinction between the two classes of alienations dealt with in S. 53 *viz.*, those in fraud of creditors and those in fraud of purchasers. As is well known these are separately provided for in England by the 13 Elizab. C. 5 and the 27 Elizab. C. 4 respectively. With reference to alienations of the *latter* kind, the question now under consideration is covered by the decision of the Judicial Committee in *Godfrey* v. *Poole* [1]. Adopting the explanation given in *Doe D. Newman* v. *Rusham* [2], as to the principle underlying 27 Elizab. C. 4, Sir Barnes Peacock there points out that the invalidation of the voluntary conveyance will result only from a *subsequent sale by the same person* and cannot follow on a sheriff's sale. Taking another line of argument from *Dolphin* v. *Aylward* [3], he also observes that the judgment-creditor can only seize or sell in execution the 'interest' of his debtor and that after the voluntary conveyance in question the debtor himself had no interest in the property though he could defeat the conveyance by a proper sale to another person.

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1. (1888) L. R. 13 A. C. 497. 2. (1852) 17 Q. B. 724; s.c. 21 L.J. (Q.B.) 139
3. (1870) L. R. 4 H. L. 500.

But an alienation *in fraud of creditors* does not stand on the same footing. No doubt in this case also the transferor ceases to have any interest in the property after the alienation, but the property is nevertheless available for his creditors; and if the creditors could proceed against it, that means that the purchaser at the sheriff's sale can acquire a good title to it as against the original transferee from the debtor. The general statement that the execution-purchaser acquires only the 'right, title and interest of the judgment-debtor' should not be interpreted to mean that the purchaser stands for *all* purposes in the shoes of the judgment-debtor, as one claiming *under* him. The sale is a sale by the law and not by the owner (Cf. *Dinendro Nath* v. *Ramkumar* [1], *Wickham* v. *The New Brunswick and Canada Ry. Co.* [2],) and the purchaser will get whatever interest the decree-holder is entitled to bring to sale. Thus in *Saratchandar Dey* v. *Gopal Chandar Laha* [3], the Judicial Committee in upholding the title of the auction-purchaser as against the real owner observed that as the mortgagee had a title by estoppel (as against the real owner), 'he could give a good title to a purchaser under a mortgage sale whatever may be the state of knowledge of the person purchasing.' The real question therefore is, can the decree-holder proceed against the property without first getting the debtor's alienation of the same declared void as against himself or as against creditors generally: or, in another form, what is the stage and what the form of proceeding, in which the question of fraud of creditors can be raised.

It is no doubt often stated that the question under S. 53 can only be tried in a suit properly constituted, that a suit for the purpose must be brought on behalf of the whole body of creditors and so on. Such observations would properly seem to relate to the right of a creditor *as such* (whether he has obtained a judgment or not) to raise the question and not to his right *as decree-holder, i. e.*, after obtaining a decree, to proceed in execution against the property forming the subject of the fraudulent alienation. (See May on Fraudulent Alienations 3rd Edition p. 311). Under the English Practice it would appear that 'a sheriff, bailiff or other officer executing a process against a debtor in right of a creditor may treat a fraudulent deed as void and seize notwith-

1. (1881) I. L. R. 7 C. 107. (P. C.) 2. (1865) L. R. 1 P. C. 64.
3. (1892) I. L. R. 20 C. 296.

standing' (May, p. 109). Mr. Bigelow also explicitly states that it is not necessary for the creditor to go into equity, unless other facts require, to set aside the conveyance; against the creditor, the conveyance is inoperative to the extent of his claim; he may levy directly (Bigelow on Fraud Vol. 2 ch. 16 S. 4, 1890 Edition, p. 415). In India, the question of fraud of creditors has often been allowed to be raised *as a defence* in suits (under S. 283 Civil Procedure Code) arising after claim proceedings (see *Ishan Chandar* v. *Bishu Sirdar* [1], and *Rajani Kumar* v. *Gaur Kishore* [2]), and the point will be found discussed at some length in *Abdul Kadir* v. *Ali Mia* [3]. We may also add that in *Doe D Grimsby* v. *Ball* [4], the question under 13 Elizab. C. 5 was allowed to be raised in defence to an action of ejectment. It was contended for the plaintiff that if the alienation was alleged to be within the statute, resort must be had to a Court of equity to set it aside and that the plea of fraud could not be urged in a Court of law; but the argument did not prevail.

S. 53 of the Transfer of Property Act only provides that the transfer is voidable at the option of the person defrauded; it does not require that the option should be exercised by him only by suing as a plaintiff. He may show his election by proceeding against the property in execution, thereby inviting a claim by the alienee, so that the question may be decided finally in the suit under O. 21. R. 63. (S. 283 of the old code). The theory of the necessity for a 'judicial avoidance' referred to in *Rajah of Ramnad* v. *Arunachalam Chetty* [5] has no application here, the creditor being a stranger to the transaction. Whether the attachment and proceedings based thereon shall have any effect at all will of course depend upon the ultimate decision of the question of fraud; but there is nothing in the language of S. 53 to lead to the inference that a creditor can proceed to attach the property comprised in the alienation *only after obtaining an adjudication* that the alienation was in fraud of creditors.

A further difficulty however still remains: suppose the alienee does not choose to put in a claim petition—and he is not *bound* to put in one; is the decree holder to be thereby foiled or can he

1. (1897) I. L. R. 24 C. 825.
2. (1908) I. L. R. 35 C. 1051.
3. (1912) 15 C. L. J. 649.
4. (1843) 11 M. & W. 531.
5. (1913) 24 M. L. J. 592.

proceed to sale, leaving the question to be afterwards agitated between the alienee and the auction-purchaser? It is stated in May's book (p. 117) that 'a purchaser from the sheriff, selling under a writ of execution, does not represent the execution creditor, so as to entitle him to impeach under 13 Elizab. C. 5 a conveyance previously made by the debtor.' The proposition seems to us open to question. Such a view will practically nullify the rule recognised almost from the day that the statute was passed (see Dyer 294 (*b*) and 295 (*a*)) that the judgment-creditor or sheriff can proceed to levy execution direct; for what is the use of that right if the purchaser at the sheriff's sale will get nothing by his purchase? The author himself observes that 'the opposite appears to be the rule in U.S. America' (as to which see 20 Am. Cycl. 433). The only English authority that he refers to, *Godfrey* v. *Poole* [1], far from lending support to his proposition, seems, if anything, to suggest the contrary. The question there arose between the execution purchaser and the persons claiming under the prior transfer by the debtor. If it were the rule that the court-sale purchaser could not raise the question under 13 Elizab. c. 5, as was held in that very case to be the rule with reference to the plea under 27 Elizab. c. 4, the Judicial Committee need not have discussed the merits of the charge under 13 Elizab. c. 5. It is significant that with reference to the plea under 27 Elizab. c. 4, their Lordships *assume* the invalidity of the prior transfer and yet rule out the court purchaser as not entitled to the benefit of such invalidity, whereas, in respect of the charge under 13 Elizab. c. 5, they have thought fit to examine and uphold the transfer on the merits. The passage above cited from May's book, does not, it is submitted, touch the question from the right standpoint. It is immaterial whether or not the purchaser can be held to 'represent' the execution creditor, for he is not seeking to raise the question of fraud of creditors on *his own initiative*. By bringing the property to sale, in spite of the prior alienation, the *creditor* has *himself* exercised the option, given to him by the law, to impeach the transfer. The auction-purchaser has only to establish that the circumstances of the alienation were such as to justify the *creditor's election*. The further reason assigned in May is clearly untenable. He says "The purchaser acquires only the debtor's interest in the property; and assuming that the

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1. (1888) L. R. 13 A. C. 497.

NOTES OF INDIAN CASES.

Parthasarathi Appa Rao v. Secretary of State, I.L.R. 38 M. 620.

The question for decision in this case was whether the reversionary right in Inams granted prior to the permanent settlement for services to be rendered by the inamdars to the Zemindar in addition to the payment of quit rent is vested in the Government or the Zemindar. As their Lordships of the Privy Council say in the recent case of *Secretary of State* v. *Kritibas* [1] the Zemindar is *prima facie* entitled to every parcel of land within the zemindari and it is for the Government to show that they are entitled to resume any portion of it by reason of some reservation at the time of the permanent settlement. Under S. 4 of the Regulation XXV of 1802, they reserve the right of resuming Lakhiraj lands and lands paying only favourable rents. Lakhiraj is a well-known term applied to lands which by reason of a special exemption in a royal grant or by having been legally devoted to religious uses or by other means, had become free from khiraj or assessment to the Government. *Raja Leelanund* v. *Government of Bengal* [2]. Lands held by private persons in lieu of wages though paying no assessment were not Lakhiraj lands for the obvious reason that the state was not interested in paying them and the Zemindar himself had no authority to exempt any land from assessment for such services.

Lands subject to personal service to Zemindar cannot therefore be Lakhiraj to any extent nor can they be called lands paying favourable rents, the latter for two reasons ; in the first place, because if they do not pay full money rent, they pay their equivalent in service ; in the second place because having regard to their obvious origin from the zemindars they cannot be regarded as lands paying favourable rent, in other words partially exempt from revenue. Even reading the section strictly, as Sir Sankaran Nair says, lands subject to service are not lands paying only favourable rents.

Krishnammal v. Sundararaja Aiyar, I. L. R. 38 M. 698.

In this case, their Lordships hold, we think rightly, dissenting from *Narayana* v. *Kandasami* [3], that omission to combine the claim for possession when suing for specific performance of a contract of sale does not bar the subsequent suit for possession based on title. The ground on which the conclusion ought to be based is to be found, we think in *Nathu* v. *Budhu* [4] *Zemindar of Vizia-*

1. (1914) I. L. R. 42 C. 710.
2. (1855) 6 M.I.A. 101 at 109 & 112.
3. (1898) I. L. R. 22 M. 24.
4. (1893) I. L. R. 18 B. 53.

nagaram v. *Behara Suryanarayana* [1] and *Ramasami* v. *Vaidhyanatha* [2]. In fact, there are two causes of action, one based on the covenant to deliver possession implied in the sale and the other based on title. The distinction is brought into relief when the period for which damages can be recovered for the withholding of possession is considered; in the one case damages can be recovered for 6 years, at all events, when the sale deed is registered, in the other mesne profits for only three years can be recovered. Again, as Sir Sankaran Nair, J., points out there is a difference in respect of persons to be made parties according as the action is on the contract, or on title. Where the action is based on contract it is difficult to see why the fact that the right to possession arises in point of time after the execution of the conveyance should make the two claims, different causes of action. Nor can the analogy of instalment bonds and rent suits be appealed to as justifying successive suits on the two claims though arising out of the same cause of action because in those cases it is not permissible to combine claims to arise in future; whereas it is always permissible to combine the claim for possession with a claim for specific performance (See Form 47 appendix A, C.P.C.). If the two claims were claims based on distinct causes of action, they could not be combined without leave of the Court. But the claims based on contract and on title are distinguishable in the same way as the claim for divorce on the ground of misconduct on the part of the wife was distinguished by the Privy Council from the claim for partition on the ground of such divorce. "The partition may no doubt", say their Lordships, "be treated as relief consequential upon the divorce and therefore dealt with in the same suit, but the evidence is different and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. If the Court should be of opinion that a petitioner has unnecessarily severed his claim for a partition from his claim for a divorce, it may, of course, punish the plaintiff by the exercise of its discretion as to costs, but their Lordships are of opinion that such a severance does not come within the mischief aimed at by Ss. 42 and 43 of the Civil Procedure Code so as to bar the claim to a partition which may be founded on the decree for divorce itself." *Maung Pe* v. *Ma Lon Magale* [3].

1. (1901) I. L. R. 25 M. 587.
2. (1903) I. L. R. 23 M. 760 at 775; s.c. 13 M. L. J. 448.
3. (1911) I. L. R. 38 C. 629 P. C.

NOTES OF INDIAN CASES.

Angammal *v.* **Aslami Sahib**, I. L. R. 38 M. 710.

On the question as to the tenant's right to remove the materials of the buildings constructed by him even after the expiry of the lease, we think the view of the majority that it is unaffected by the Transfer of Property Act is right either on the ground of *local usage* as suggested by Sir V. Bhashyam Aiyangar in *Ismaikani Rowthan* v. *Naza-ali Sahib* 1 and by Fletcher and Chatterjea, JJ., in *Kani Lal Jalan* v. *Rasik Lal Sadhr Khan* 2 or on the ground that it is an incident of the contract of tenancy which is not inconsistent with any of the provisions of the Transfer of Property Act and as such preserved by S. 2 Cl. (*b*) of that Act. The argument based on hardship suggested by Garth, C.J., in 8 C. 582 has really no substance; for, the fact that the tenant is entitled to remove the materials within a reasonable time after the expiry of the lease, does not take away his duty to restore vacant possession immediately on the expiry of the lease with the premises in as good a condition as they were in at the date of the demise and if his buildings interfere with such delivery he is bound to make compensation for such interference. The question may be looked at also from another point of view. The tenant's duty is limited to restoring it in the condition in which it was delivered to him and the right of the landlord to claim the materials is really based on the general law involved in the maxim *quicquid plantatur*, etc., The absence of such a rule in India may well entitle the court administering rules of equity and good conscience to give the defendant time to remove his materials. It would seem to be but a rule of *common justice* such as is referred to by Lord Macnaughten in *Henderson* v. *Attwood* 3 Cf. *Ganga Din sonar* v. *Jagat Tewari* 4. But the tenant having been evicted, whether he should have a similar indulgence is another matter. On the whole the *Via Media* suggested by Mr. Justice Miller, supported as it is by the analogies of English law as to trade fixtures, seems to best accord with equity. The reasoning of Mr. Justice Sankaran Nair based on the absence of the rule *quicquid plantatur* in India ignores the fact that the absence of that rule

1. (1908) I. L. R. 27 M. 211.
2. (1914) 19 C. W N. 861.
3. (1894) A.C. 150, 168.
4. (1914) 12 A. L. J. 1026.

does not warrant the affirmation of an absolute right in them to the tenant and also assumes that the owner of a land is bound to give way leave to a person whose goods might be on his land at any time he chooses. Nor is there any warrant for casting a duty on the landlord to pull down the buildings and hand over the materials to the tenant. Even assuming the tenant remains the owner of the materials of the building, the tenant can have no cause of action against the landlord for enjoying the benefit of the materials so long as no actual *conversion* takes place so as to entitle him to sue for the value of the materials. Where the building has been raised with the consent of the landlord, S. 63 of the Easements Act might apply but even that section gives only a reasonable time for the removal of the goods placed on the land.

On the other question as to the tenant's right to compensation there is we think much to be said in favour of the view of Sankaran Nair, J. that in the case of tenancies of uncertain duration when the landlord gives consent to the construction of permanent structures, he is bound to pay compensation for them when he puts an end to the tenancy. On the faith of the license given by the landlord, the tenant having executed a work of a permanent character and incurred expense in the execution (see S. 60 Easements Act), the landlord is not entitled to revoke the license without making compensation for the expense incurred.

Re Lewis: I. L. R. 38 M. 773.

Unless we are grossly mistaken, there seems to be a slip in this case. In S. 40, the word offence is stated to be used in the extended sense of "things made punishable by special or local law" in certain of the sections of the Penal Code and among those, Chapter IV which includes S. 79 is specially mentioned. S. 79 and not merely the principle of S. 79 therefore would apply to forest offences...

Lakshmammal *v.* Narasimharaghava Aiyangar, I. L. R. 38 M. 747.

Although it is questionable if the plaintiff's view as to what is material, can make a really immaterial alteration a material one, in this case the effect of the alteration being to convert a negotiable into a non-negotiable instrument, the alteration must be considered to be material and in that view the judgment is obviously right.

NOTES OF INDIAN CASES.

Rani Rajat Dat *v.* Sheo Dayal: I. L. R. 37 All. 439.

Mr. Justice Pigott in this case, lays down the correct rule we think when he says that in sanction cases, the Appellate Court is expected to exercise an independent judgment whether on the facts sanction should or should not be granted. It is difficult to see what power the Court has, to cut down the right of the party to an appeal on the facts when the legislature has not chosen so to limit it. No doubt there may be some cases in which an element of discretion enters for instance those cases in which though there is a *prima facie* case, the Court may not consider it in the interests of justice that prosecution should take place. In such cases, according to well-known principles, the Appellate Court may refuse except in exceptional cases, to interfere with the discretion of the Court below but in ordinary cases, where the only question is whether a *prima facie* case is made out or there is a reasonable and probable chance of conviction, there seems to be little warrant in law to cut down the right of the party by any convention among the judges. If an appeal or second appeal should not, as a matter of principle, lie in sanction cases, that is for the legislature and certainly not for the courts. The Allahabad High Court no doubt, is not troubled by the question of procedure in second appeals as on the construction put by that court on S. 195 Criminal Procedure Code, only one appeal lies. Our court has put a more liberal construction on the section but that cannot affect the rule laid down in the case as to the duty of the Appellate Court even though the appeal is a second appeal.

Padarnath Halwai *v.* Ram Narain Upadhia, I. L. R. 37 A. 447 P. C.

What amounts to attestation? Is it necessary that the witness should actually see the faces of the executants or is it sufficient if he sees a hand writing and is able to identify by the voice that the hand is of the alleged executant ? These and many other difficult questions are bound to arise from the strict view taken of the requirements of a valid attestation in *Shamu Pattar* v. *Abdul Kadir* [1], especially when pardanashin ladies are concerned. There is no question that that case has added a new terror to creditors, however

1. (1912) I. L. R. 35 M. 607.

honest their claims. The genuineness of the transaction might be undisputed as it was in this case but it is open to a dishonest debtor, nevertheless, to evade the liability by showing that the attestor was not actually present at the execution or though present did not actually see the execution. In this country where registration is compulsory, it is somewhat difficult to perceive the necessity for such strict rules as regards attestation and it is also somewhat curious that while mortgages require attestation, sales do not. It is no less in the interests of justice that a genuine transaction should not be defeated owing to the ignorance or fraud of the attesting witnesses than that a false transaction should not be passed as a genuine one. It can never be difficult for a dishonestly inclined attestor to make a plausible case of not witnessing the execution without laying himself open to prosecution for a charge of perjury. The crop of cases in which the defence of no proper attestation is raised, shows that the danger is, by no means, an imaginary one. Their Lordships in this case took a practical view of the question and held that the attestation was sufficient.

Whatever may be the rights of a purchaser of a portion of the property against the mortgagee who waives his right as against the other portions of the mortgaged property in a way prejudicial to his rights, the former can have no right when his purchase is subsequent to such prejudicial action of the mortgagee. It was argued in this case that because a prior mortgagee failed to insist upon his priority in a suit by the second mortgagee to which the mortgagor also was a party a purchaser in execution of the decree passed under S. 90 of the Transfer of the Property Act in the suit on the second mortgage was entitled to plead that the prior mortgagee lost his claim against him. Their Lordships negative the contention saying that the purchaser got only the rights of the mortgagor as it existed at the date of his purchase and could not rely upon the mortgagee's earlier laches.

Risal Singh v. Balwant Singh: I.L.R. 37 All. 496:. Though the oral evidence of the widow had been excluded in the Court of the First Instance their Lordships of the Privy Council, with the knowledge of that fact, having proceeded to give a decision "so that further litigation may be happily out of the question" it would really have been a strong thing for the Court to say that there was not "a fair trial of the question" which is all that is

necessary according to the Sivaganga case to make the decision binding on the reversioners. If the decision in the previous case had proceeded on the question of estoppel, the widow might well have been said not to have represented the reversioners but having regard to the course the case took, the conclusion of the majority seems preferable. Having regard to Expl. VI of S. 11 of the Civil Procedure Code it is doubtful whether negligent conduct of the suit if honest, will prevent the reversioner being bound—Cf. S. 3 of the General Clauses Act Cl (20). In the analogous case of the Karnavan, negligence short of fraud has been held not to matter. Fair trial *i.e.* trial at arm's length between the parties is not inconsistent with negligent conduct on the part of the widow though Justice Markby would seem to hold that negligent conduct being inconsistent with her duty to *protect* as well as represent the estate, such a conduct will prevent the decision from operating as *res judicata* (I.L.R. 2 C. 222). In the case of trustees, their Lordships of the Privy Council have laid down the further requirement of "proper issues being raised and decided" though it is not clear whether that is for the purpose of deciding whether the trust was actually represented or for the purpose of deciding whether the trust was effectively represented (L. R. 2 I. A. 145). Possibly, trustees' and minors' cases stand on the same footing which is a somewhat different footing from that of the widow. In the case of minors, gross negligence of the guardian prevents the decision from binding the minor. But why is a party to be said not to have obtained a judgment "fairly and properly" against the widow merely because the widow negligently conducted the suit. The words "fairly and properly" in the Sivaganga case seem to be paraphrased into "*bona fide*" in Explanation VI to Sec. 11. Sir Barnes Peacock understood the rule to be "in the absence of fraud or collusion, a decision against a widow, with regard to her husband's estate, would be binding upon the reversionary heirs." Even in a case like 11 M. I. A. 242 where the widow's default is the basis of the action, it is not clear if their Lordships mean anything more than that the mortgagee might as a matter of caution or to be fair, have made the reversioners parties. It is difficult to read into their Lordships' judgment an absolute disqualification in the widow in such a case to represent the estate. Unless a charge is claimed or the reversioners are made parties, the Court would

not ordinarily treat the decree based on the widow's default as one passed against the widow in her representative character.

Utma Kumar v. Bhagwanta Kuar : I. L. R., 37 A. 515.

Having regard to the view taken by the Privy Council in *Annie Besant's case* [1], it would seem to be necessary to bring all attempts on the part of guardians whether natural or appointed to gain, or regain the custody of their wards within Sec. 12 or Sec. 25 unless one is prepared to say that a particular case is a *casus omissus*. For instance, suppose the father has made over the custody of the child to another and he refuses to hand over the child? Sec. 12, if read with the context, would seem to be inapplicable except to cases of pending applications for appointment of guardians. S. 25 is the only other section bearing on the question and runs as follows: "If a ward leaves or is removed from the custody of a guardian of his person, &c." Unless these words of S. 25 are read in a somewhat extended sense or unless S. 12 is read out of its context and disjunctively, the father would have no remedy. The case under review affords another instance. The mother of a girl who had been appointed a guardian of the person wanted to have the girl from the custody of her elder sister who had taken her away before the proceedings. The application was made after the proceedings were over and as such S. 12 strictly read could not apply. It was difficult also to bring it within S. 25 as the ward could not be said to have left or been removed from the custody of the guardian. Their Lordships nevertheless hold that either S. 12 or S. 25 applied to the case and the Court had power to direct the handing over of the child.

Janki Kuar v Lachimi Narain. I. L. R., 37 A. 535.

The point at issue in this case, whether a judgment could be vacated on the ground that it was obtained by false and perjured evidence, has been elaborately considered in *Chinnaya* v. *Ramanna* [2] and the view taken in this case is the same as the judges were inclined to take in that. As pointed out in that case, fraud must be extrinsic and collateral and it is difficult to see how the very issue necessarily involved in the case namely whether a party's witnesses are lying or not can be reagitated by giving it

1. (1914) 27 M. L J. 30. 2. (1913) I. L. R. 38 M. 203,

the name of fraud. It must be confessed however, that the English authorities are not quite as easily distinguishable as is assumed in this case and also that the line between fraud that vitiates a judgment and fraud that does not, must in some cases at least be very thin.

Munna Lal Parrack *v.* **Sarat Chunder Mukerji** I. L. R. 42 C. 776 (P. C.)

The brevity of their Lordships' judgment in this case throws us back upon the judgment of the High Court, *Amlook Chand* v. *Sarat Chunder* [1] which they affirm. As there pointed out by *Jenkins*, C. J. it was hoped that the changes introduced by the Code of 1908 would end the conflict of decisions as to (i) whether an application for an order under S. 89 of the Transfer of Property Act was an application in execution or not and (ii) as to the rule of limitation in respect of such an application. The first question may now be regarded as settled; but this has not led to a similar certainty of law as to the second. Sir Lawrence Jenkins evidently expected that the opinion expressed in *Madhab Mani Dasi* v. *Lambert* [2] on the question of limitation would not be followed under the new Code. but in *Biswambhar Shaha* v. *Ram Sundar* [3] Holmwood and Chapman, JJ, adhered to that opinion, though the actual question there arose with reference to an application for a supplemental decree under O. 34 R. 6. The extreme view that prevailed in the Calcutta High Court that applications under S. 89 of the Transfer of Property Act were subject to no legal rule of limitation must be taken to have been overruled by the decisions of the Judicial Committee in *Abdul Majid* v. *Jawahir Lal* [4] and *Batuk Nath* v. *Munni Dei* [5] though in both these cases it was assumed that Art. 179 of the old Limitation Act would apply (see however the reasons assigned in *Rangiah Gounden* v. *Nanjappa* [6] for applying Art. 178 in preference to Art. 179). And the decision in *Ashfaq Husain* v. *Gauri Sahai* [7] cannot, in view of the later decisions, be understood to lay down either that an application for an order absolute (prior to the new Code) was not a proceeding in execution or that no rule of limitation applied to it. The question there arose in proceedings after order absolute.

1. (1911) I. L. R. 38 C. 913.
2. (1910) I. L. R. 37 C. 796
3. (1914) I. L. R. 42 C. 294.
4. (1914) I. L. R. 36 A. 350
5. (1914) I. L. R. 36 A. 284.
6. (1902) I. L. R. 26 M. 780.
7. (1911) I. L. R. 33 A. 264 (P C.)

But it is difficult to say that these decisions of their Lordships or even the decision under notice can be held to govern applications for a 'final decree' under Rules 3, 5 Or. 8 of O. 34 of the new Code or a supplemental decree under rule 6. It is however noteworthy that even the Calcutta High Court has now come to hold that applications for a decree absolute under O. 34 C. P. C. are governed by Art. 181 of the Limitation Act of 1908. (*Beni Singh* v. *Berhamdeo Singh* [1], the case of *Kista Bar* v. *Srim ati Banamoyi Devia* [2] though reported in the same volume was decided so long ago as May 1914 and the question there arose under the old Code: it may therefore be left out of account. The views of the other High Courts will be found in *Thathara Nannabha Chetti* v. *Kuppal Krishnammal* [3], *Rama Venkatasubba Iyer* v. *Shanmukam* [4], and *Madhoram* v. *Netal Singh* [5], *Datto Atmaram* v. *Shankar Dattatraya* [6]. The dictum in *Dhoki Khodalo Patra* v. *Vidya Bhushana* [7] that no rule of limitation governs an application to pass a final decree in a pending suit is not likely to be followed hereafter. As to the decision in *Singaravalu Pillai* v. *Santhana Krishna Mudaliar* [8] we cannot help feeling that there is some error in the statement that the decree was *after* the new Code came into force. The decision in *Madhoram* v. *Netal Singh* [5] raises an interesting question as to the starting point for limitation in cases in which the preliminary decree is appealed against. With regard to applications for supplemental decree under O. 34 R. 6, the question of limitation cannot yet be regarded as settled by authority, *Rama Venkata Subba Iyer* v. *Shanmukham* [4] being directly in conflict with *Bisvambhar Shaha* v. *Ram Sundar* [11].

Kunja Lal Banerji *v.* Narasamba Debi I. L. R. 42 C. 826.

The extent to which the rule of Damdupat is still in force is a matter of some uncertainty. It is also anomalous that on a question of this kind, there should be a difference between one Presidency and another or that the law should be one thing for the presidency town and another for the mofussil. The suggestion for removal of the anomaly by the legislature, made so early as

1. (1915) 19 C. W. N. 473.
2. (1914) 19 C. W N. 470.
3. (1913) 14 M. L. T. 194.
4. (1913) M. W. N. 867.
5. (1915) 13 A. L. J. 985.
6. (1914) I. L. R. 38 B. 32.
7. (1918) 22 I. C. 283.
8. (1915) M. W. N. 648.
11. (1914) I. L. R. 42 C. 294

in *Nobin Chunder's case* [1] has not so far been heeded. The reasoning in the *Madhwa Siddhanta Onnahini Nidhi's case* [2] that, so far as mortgages are concerned, the application of the rule of Damdupat is precluded by the language of the sections of the Transfer of Property Act dealing with mortgage decrees, does not seem to us altogether convincing; and it remains to be seen whether the Madras High Court will continue to follow it, even after the legislation of 1908, by which the sections of the Transfer of Property Act there relied on have been removed to the Code of Civil Procedure, which cannot reasonably be construed as abrogating any rule of *substantive* law. We are, however, unable to appreciate the argument based, in the case under notice, on S. 4 of the Transfer of Property Act. That only enacts that the provisions in the Act which relate to contracts shall be taken as part of the Contract Act. It is difficult to say that Ss. 86, 88 and 92 of the Transfer of Property Act—which are relied on in the Madras case—'relate to contracts' within the meaning of this provision.

Ahid Khondkar *v.* **Mahendra Lal** De. I. L. R. 42 C. 830.

With all respect, we beg leave to differ from the view here taken as to the power of an Appellate Court in dealing with an order granting a review on the ground of the discovery of new evidence. When the legislature was particular to make such an order of a Subordinate Court appealable, it seems to us practically defeating its intention, to say that the Appellate Court has only to see if there was 'legal' evidence before the first court, *whatever its probative value*, of circumstances justifying a review. In the view taken by the learned Judges, the word 'strict' would have been altogether unnecessary; for the wood 'proof' when used with reference to a court of law, would of itself have signified proof in such *form* as is allowed by the law of evidence. It is true that as a general principle it is the Court of First Instance that is to decide whether there should be a review or not; and in one class of cases, *viz.*, where the review is granted for 'other sufficient cause, the discretion of that court has been held to be nearly absolute See *Tholan* v. *Kunhi Kutti* [3], *Gopala Iyer* v. *Ramaswami Sastrial* [4], *Ali Akbar* v. *Kurrbad Ali* [5], *Harickaran Saha* v. *Baran*

1. (1887) I. L. R. 14 C. 781.
2. (1903) I. L. R. 26 M. 662.
3. (1912) 24 M. L. J. 93
4. (1907) 17 M. L. J. 603
5. 27 All. p. 395.

Khan [1], *Muni Ra Rani Choudhri* v. *Bishen Prakash Narain* [2]

But this won't justify the view that even in so far as the specified causes are concerned and to the extent to which an appeal is expressly allowed, the functions of the Appellate Court are to be unduly circumscribed on the strength of this general principle.

[*End of Vol. XXIX.*]

1. (1914) I. L. R. 41 C. 716. 2. (1897) I. L. R., 24 C. 878.

NOTES OF RECENT CASES.

Seshagiri Iyer and Napier, JJ. 1915 August, 3.	S. A. 2523 of 1913 and S. A. 290 of 1914.

Estates Land Act—Ss. 145, 151, & 152—Award of compensation—Existence of relation of landlord and tenant, thereafter—Material injury to the holding, a finding, of fact—Injury to a part of the holding—Finding that the holding as a whole, was materially injured, a finding of fact.

The compensation awardable in favour of the landholder under Ss. 151 and 152 of the Estates Land Act on account of material injury to the holding by a tenant, is only for the injury done to the holding as an agricultural holding. It does not include the value of the landholder's right in the land, and hence the award does not put an end to the relationship of landlord and tenant, which continues even thereafter on the same terms as before.

A finding under S. 151, that the holding has been materially injured is a finding of fact. Though the tenants of a single holding sub-divide the holding among themselves, the sub-division is not binding upon the landholder unless he assents to the same.

A finding that a holding as a whole has been materially injured even though a portion of it alone has been built upon by one of such tenants is a finding of fact.

N. Rajagopalachariar for the landholder.

C. S. Venkatachariar for the tenant.

Wallis, C. J. Sadasivayar and Srinivasayangar, JJ. 1915 August, 3.	A. S. No. 83 of 1913.

Court Fees Act (VII of 1870) S. 7, Sub-sec. 4—Suits under—Valuation in the plaint if determines fee payable on appeal.

In suits coming under S. 7, Sub-sec. (4) of the Court Fees Act, when the plaintiff has valued the relief prayed for and ob-

tained a decree, (in this instance, a preliminary decree for accounts) and the defendant appeals against the whole decree, the latter is bound by the valuation in the plaint.

Samiya Mavali v. *Minammal* [1], followed.

K. Bhashyam for Appellant.

T. V. Venkatarama Iyer for Respondent.

Wallis, C. J.
Sadasiva Aiyar and
Srinivasa Ieyngar, JJ.
1915 August, 4

S. A. No. 1098 of 1914.

Madras Estates Land Act (I of 1908) Ss. 213, 189 and 134 —Ryotwari Land—Excessive distraint—Suit for damages jurisdiction—Revenue Court.

A suit by the tenant of a ryotwari land-owner or of any sub-tenant of such, for damages for illegal distraint of moveable property, or growing crops in a defaulter's holding is cognizable solely by the Revenue Court.

N. Srinivasacharya for Appellant.

L. A. Govindaraghava Iyer for Respondent.

Srinivasa
Iyengar, J.
1915 August, 5

C. R. P. 884 of 1914.

Transfer of Property Act, S. 55 (2)—Mortgage-debt, transfer of—Covenant for title—Breach—Damages—Limitation Act, Art. 116—Cause of action, when arises.

In the case of a transfer of a mortgage-debt there is no covenant for title implied by the Statute, as in the case of a transfer of immoveable property.

Obiter: The cause of action for damages for breach of a covenant for title, in the case of a registered conveyance, arises on the date of the execution of the conveyance.

A. V. Visvanatha Sastri for Petitioner.

K. S. Jayarama Iyer for Respondent.

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1. (1889) I.L.R. 23 M. 490.

NOTES OF RECENT CASES.

Seshagiri Aiyar J.
Napier, J.
1915 August, 3.

S. A. 2378 of 1913.

Hindu Law—Religious Endowment—Temple—Introduction of new idol, if a breach of trust.

The introduction of a new stone idol of Vigneswara, by some of the trustees of a temple dedicated solely to the worship of a Goddess, does not constitute a breach of trust.

G. S. Venkatarama Aiyar for Appellants.

V. Purushotama Aiyar for Respondents.

Ayling, J.
Tyabji, J.
1915 August, 5.

S. A. 1045 of 1907.

Specific Relief Act, S. 42—Suit for declaration—Possession with life-tenant—Nature of possession in dispute—Cause of action—Co-owners—Knowledge of denial of title—Limitation Act, Art. 120.

A suit for a declaration that the defendant's possession is merely that of a life-tenant and that the plaintiffs' community is entitled to the properties is maintainable. The period of limitation for a suit for declaration of title starts from the date when the plaintiff first becomes aware of the denial of his title by the defendant.

Knowledge of denial of title on the part of some of several co-owners does not affect the rest.

Semble: If the majority of the co-owners had knowledge of the denial of title more than 6 years prior to a suit for declaration of title by the rest of them, the court may refuse to exercise its discretion in granting a declaration under S. 42 of the Specific Relief Act.

G. S. Ramachandra Aiyar for Appellants.

T. R. Ramachandra Aiyar for Respondents.

Ayling J.
Tyabji, J.
1915 August, 6.

Cr. Rev. Cas. Nos. 3 & 28 of 1915.

Criminal Procedure Code, S. 345—Compromise in Revision, Sanction for—High Court's powers.

Under S. 345 of the Criminal Procedure Code, the High Court has no power to sanction a compromise of a criminal case in revision against a conviction.

32 A. 153 dissented from.

T. Ramachandra Rao and *Rao Sahib G. Venkataramiah* for Petitioners.

Public Prosecutor *contra.*

Spencer J.
Kumaraswami Sastri, J.
1915 August, 10.

S. A. 2649 of 1913.

Limitation—Adverse Possession—Hindu Widow—Adverse Possession against—Effect on rights of reversion—Limitation Acts of 1871, 1877 and 1908.

Under the Limitation Acts of 1871, 1877, and 1908, possession which is adverse to a Hindu Widow is not adverse to the reversioners.

B. Sitarama Rao for Appellant.

K. Sundara Rao for Respondent.

Seshagiri Aiyar J.
Napier, J.
1915 August, 10.

C. M. A. 2 of 1915.

Hindu Law—Adoption—Joint Family—Divesting, Rule of.

A. and B. were undivided brothers forming a joint Hindu family. A died in 1907 issueless giving his widow authority to adopt. B. died in 1909 leaving a son. In 1911 the widow of A adopted C. *Held,* that the adoption was valid and that C. was entitled to a moiety of the property in the hands of B.'s son.

Madana Mohana Deo v. *Purshotam Deo* [1] followed.

G. S. Ramachandra Aiyar for Appellants.

A. Krishnaswami Aiyar for Respondents.

1. (1914) 27 M. L. J. 306.

Spencer J.
Kumaraswami Sastri, J. S. A. 2355 of 1913.
1915 August, 10.

Landlord and Tenant—Mulgeni tenants—Right to cut and appropriate trees.

Mulgeni tenants in South Canara are entitled to cut and appropriate for their own use trees spontaneously grown as well as trees planted by themselves during the currency of their lease.

K. Ramanatha Shenai for Appellant.

B. Sitarama Rao for Respondent.

Seshagiri Aiyar J.
Napier, J. S. A. 1589 of 1913.
1915 August, 10.

Lease—Forfeiture for non-payment—Court's power to relieve against—Period of grace allowed in lease—Effect.

Courts have power to relieve against forfeiture for non-payment of rent though even there is a period of grace allowed in the lease-deed.

B. Sitarama Rao for Appellant.

K. Ramanatha Shenai for Respondent.

Coutts Trotter J.
Srinivasa Aiyangar J. A. S. 280 of 1913.
1915 August, 20.

Judgment—Not inter-partes*—Effect of—Hereditary Office—Adverse possession against widow—Suit by reversioner—Limitation Act, art. 124, 141.*

A judgment or decree declaring A's. title to certain property as against B., the only other possible claimant at the time, will operate as a root of title against C. who is a subsequent squatter on the property.

Per Srinivasa Aiyangar J. The judgment has the effect of a conveyance by B., in favour of A., though not open to attack on grounds on which a conveyance can be attacked. The judgment can be attacked only on the ground of want of jurisdiction in the court or on the ground that it was obtained by fraud. A plea that the judgment is erroneous in law, in that it recognises the legality of the alienation of a religious office, is not one affecting the jurisdiction of the court.

Quaere: Whether a judgment which is obtained against some out of several legal representatives is binding on the others, not parties to the litigation.

Where a widow who is the incumbent of a hereditary office is dspossessed, a suit for possession of the office by the reversioner is governed by art. 124 and not by art. 141 of the Limitation Act. Adverse possession against the widow, of a hereditary office, for the Statutory period bars the reversioners. Enjoyment of the emolments of the office as well as performance of its duties to the exclusion of others is necessary to confer a title to the office by prescription.

Per Srinivasa Aiyangar J.: Where a person entered into possession of an office on behalf of himself and his minor brother, and the emoluments of the office were enjoyed by both, but the elder brother performed the duties of the office exclusively, *held*, that the elder brother alone acquired the right to the office.

A. Krishnaswami Aiyar for Appellants.

T. Narasimha Aiyengar and *C. S. Venkatachariar* for Respondents.

Spencer J.
Kumaraswami Sastri J.
1915 August, 20.

S. A. 646 of 1913.

Mortgage—Consideration—Right of person in possession to question—Onus of proof—Mortgage without consideration—Effect.

Where a person is in possession of property purchased by him in execution of a mortgage decree, it is open to him to show that another mortgage which is sought to be enforced against the property is without consideration. The onus of proving consideration in such a case is on the person seeking to enforce the mortgage. A mortgage without consideration is a nullity and confers no right on the mortgagee.

23 I. C. 805 followed.

C. V. Ananthakrishna Iyer and *K. R. Rangaswami Iyangar* for Appellants.

T. V. Muthukrishna Iyer for Respondents.

NOTES OF RECENT CASES.

Seshagiri Aiyar and Napier, JJ. 1915 August, 12. — C. M. S. A. 19 of 1914.

C. P. C. of 1908—O. 21, R. 57—Applicability—Decree—Execution application—Dismissal in consequence of order of appellate Court staying execution—Revival of application after 12 years from date of decree.

O. 21, R. 57 of the Code of Civil Procedure, 1908, does not apply to cases in which there is no default on the part of the decree-holder.

Where an execution application is dismissed in consequence of an order of the appellate Court staying execution, it can be revived even after the lapse of 12 years from the date of the decree.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for Appellants.

S. Ranganatha Aiyar for Respondents.

Spencer and Seshagiri Aiyar, JJ. 1915 August, 17. — S. A. 551 of 1913.

Hindu Law—Widow—Alienation—Compromise—Validity—Distinction—Compromise by daughter and her son, sole reversioners at time of compromise—Validity.

A compromise to which a Hindu daughter and her son, the sole reversioners at the time, were parties constitutes an alienation by the daughter with the consent of the next reversioner and as such is binding on the estate.

On principle there is no distinction between a compromise and an alienation by a Hindu widow.

G. Venkataramiah for Appellant.

P. Narayanamurti for Respondent.

Sadasiva Aiyar, J.
and Napier, J.
1915 August, 13.

S. A. 1257 of 1913.

Deed—Construction—Release or conveyance—Test.

Where the question was as to whether an instrument styled a release was a release-deed merely or operated to pass title to the person in whose favour it was executed and it appeared that the deed recited a sum of Rs. 2,000 as consideration for the release and the intention of the executant was clear that the other party should enjoy the property covered by the deed as owner, *held*, that it operated to pass title.

B. Somayya for *P. Narayanamurti* for Appellant.

G. Venkataramiah for Respondent.

Wallis, C. J.
Sadasivayar and
Srinivasayangar, JJ.
1915 August, 21.

S. A. 19 of 1913.

Adverse possession—Simple mortgage—Adverse possession against mortgagor, not adverse to mortgagee.

Adverse possession by a stranger for more than 12 years of a property, which is subject to a hypothecation, does not extinguish the rights of the mortgagee.

Ramasami Chetty v. *Ponna Padayachi* [1]. Dissented from.

G. S. Ramachandra Iyer for Appellants.

C. Padmanabha Iyengar for the Respondent.

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1. (1910) I. L. R. 36 M. 97.

NOTES OF RECENT CASES.

Spencer, J.
Coutts Trotter, J.
1915 August, 27.

S. A. 1636 of 1912.

Service Inam—Enfranchisement—Effect of—Mortgage prior to enfranchisement—Validity—Hindu Law—Inheritance—Property inherited from maternal grandfather—Nature of—Right therein of son of person inheriting.

The effect of enfranchisement of a Service Inam (in this case, a Bariki Service Inam) is to make the Inam the joint family property of the joint family of which the office-holder is a member and not to make it the self-acquisition of the office-holder himself.

26 M. 339 followed.

Property inherited by a person from his maternal grandfather is ancestral property in his hands so as to give an interest in it to his son.

27 M. 382 followed.

29 A. 667 Dissented from.

A mortgage of a Service Inam prior to its enfranchisement is void and cannot be relied upon for any purpose.

Hon. B. N. Sarma for Appellant.

V. Ramesam for Respondent.

Ayling and Tyabji JJ.
1915 *August, 31.*

S. A. No. 1192 of 1913.

Decree—Setting aside—Arbitration—Decree on Award—Minor not bound, in the absence of leave of court.

A minor though a party to the suit, is not bound by a decree passed in pursuance of an award of arbitrators, appointed by the consent of parties, unless the leave of the court has been recorded.

V. Ramadoss for Appellant.

P. Nagabushanam for Respondent.

Sadasivayar and Napier, JJ. 1915 August, 31. S. A. 2672 of 1913.

Ejectment—Possessory title—Effective against trespasser.

A person who had been in peaceable possession of property without title, though only for a short time, is entitled to recover possession of the property from a subsequent trespasser who forcibly dispossesses the former.

S. Duraisami Iyer for Appellant.

S. Ranganatha Iyer for Respondent.

Ayling and Tyabji, JJ. 1915 August, 31. S. A. 2859 of 1913.

Hindu Law—Gift by husband to wife—"Sarvaswathanthramai", meaning of—Interest taken by wife.

The ordinary presumption of Hindu Law is that gift by a husband to his wife confers only a life-estate upon her. The mere use of the words 'Sarvaswanthramayi' is insufficient to confer an absolute estate on the wife, especially where the surrounding circumstances do not evidence such an intention.

S. Krishnamachariar for Appellant.

T. V. Gopalaswami Mudaliar for Respondent.

Ayling and Tyabji, JJ. 1915 August, 31 S. A. 2726 of 1913.

Transfer of Property Act, Ss. 83 and 84—Deposit—withdrawal of application for service of notice on mortgagee—Delay of Court—No cessation of interest.

Where a mortgagor deposited the amount due in Court, but withdrew his application for service of notice on the mortgagees before all of them had been served. *Held,* that there was no valid tender so as to stop the running of interest.

B. Narasimha Row for Appellant.

P. Somasundaram for Respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Napier, JJ. 1915 August, 31. — Ref. case 1 of 1914.

C. P. Code, O. 2 R. 2—Not applicable to Village Munsiff's Courts.

The provisions of the Civil Procedure Code have no application to the Court of a Village Munsiff. O 2 R. 2 of the Civil Procedure Code, does not bar a suit on a cause of action in a Civil Court though a portion of the claim in respect of the same cause of action had been sued for in a Village Munsiff's Court.

Spencer and Seshagiri Iyer, JJ. 1915 September, 1st. — S. A. 237 of 1914.

Madras Estates Land Act, Ss. 3 (5) and 161—Lessee of estate—Arrears of rent due before expiry of lease—Sale of ryot's holding after expiry of the lease—Lessee not in possession.

A lessee of an estate cannot, after the expiry of the lease and after he has ceased to be the landlord in possession, sell the ryot's holding for recovery of arrears of rent due to him while he was the landholder in possession.

M. D. Devadoss for Appellant.

S. Ramaswami Iyer for Respondent.

Sadasivayar and Napier, JJ. 1915 September, 3. — Ref. case 3 of 1914.

Presidency Towns Insolvency Act, S. 17—'other legal proceeding', meaning of—Application for warrant of arrest of judgment-debtor—Security taken on such application void.

An application for execution comes within the "other legal proceeding" in S. 17 of the Pres Towns. Insolvency Act. After the judgment-debtor has been properly adjudicated an insolvent, it is not competent to a Small Cause Court to order the debtor to furnish security on an application for the arrest of the debtor, in execution of a decree against him.

P. Venkataramana Rao for Appellant.

W. V. Rangasami Iyengar for Respondent.

Wallis C. J. &
Seshagiri Iyer, J.
1915 September, 6.

A. S. 98 of 1913.

Hindu Law—Inheritance—Sudras—Adopted son and aurasa *son, Shares of—Partition decree—Provision for marriage.*

Under the Hindu Law, even among Sudras, an adopted son in competition with a subsequently born *aurasa* son gets only a fifth of the estate. In a partition decree, provision can be made for the marriage expenses of unmarried male co-parceners.

V. Ramadoss for Appellant.

P. Narayanamurti for Respondent.

Sadasivayar and
Napier, JJ.
1915 September, 6

L. P. A. No. 16 of 1913.

Civil Rules of Practice, R. 49 (1)—Appeal—Non-production of printed copy of judgment—Presentation of appeal with manuscript copy of judgment, valid.

The presentation of an appeal to the District Court with a certified manuscript copy of the judgment of the lower Court is not invalid.

C. S. Venkatachariar for Appellant.

M. D. Devadoss for Respondent.

Sadasiva Aiyar
and Napier, JJ.
1915 September, 6.

L. P. A. No. 258 of 1914.

Transfer of Property Act, S. 54—Unregistered sale-deed of immoveable property of less than Rs. 100 in value—Admissible in evidence, when.

An unregistered sale-deed of immoveable property of the value of less than Rs. 100, in pursuance of which the vendee takes possession of the property, is admissible in evidence to prove the agreement for sale and the passing of possession thereunder.

T. Prakasam for Appellant.

P. Narayanamurti for Respondent.

Tyabji and
Phillips, JJ.
1915 September 7.

S. A. 2423 of 1913.

Civil Procedure Code, Sch. ii, para 16—Arbitration—Reference—Want of consent of one of the defendants—Award—Decree, if binding on defendant not a party to the reference.

Per Tyabji, J.—A defendant who was not a consenting party to a reference to arbitration, is not bound by the award and the decree passed thereon, and he is entitled to have the decree set aside so far as he is concerned.

Per Phillips, J.:—If a defendant has voluntarily left the conduct of the defence in the hands of other defendants and there has been an arbitration to which the other defendants consented, the former is also bound by the decree passed in accordance with the award.

T. R. Venkatarama Sastri for Appellant.

T. V. Gopalasami Mudaliar for Respondent.

Wallis, C. J. & Srinivasayangar, J. 1915 September, 7. } C. M. P. 1682 of 1915.

Civil Procedure Code, Ss. 109 & 110—Privy Council—Leave to appeal—Value of the subject-matter—Test.

The value of the subject-matter of a suit for the recovery of immoveable property in the court of first instance was less than Rs. 10,000. The High Court, on appeal, decreed the suit with mesne profits. At the date of the decree of the High Court the original value together with the mesne profits allowed by the decree, amounted to more than Rs. 10,000. *Held*, that the case did not fulfil the requirements of the first clause of S. 110, C. P. Code, and that leave to appeal to the Privy Council could not be given. The scope of S. 110, C. P. Code, explained.

T. R. Ramachandra Iyer, and *G. S. Ramachandra Iyer*, for Petitioner.

R. Kuppusami Iyer, for Respondent.

Sadasiva Aiyer and Napier, JJ. 1915 September, 8. } L. P. A. 375 of 1914.

Evidence Act, S. 116—Estoppel—Landlord and Tenant—Attornment, Effect of—Denial of title.

S. 116 of the Evidence Act applies only to a case where the person claiming to be the landlord actually let the tenant into possession.

Where a tenant already in possession of land attorns to another, he is not estopped from denying the title of the latter.

T. R. Venkatarama Sastri for Appellant.

K. S. Ganesa Iyer for Respondent.

Sadasivayar and Napier, JJ. 1915 September, 9. C. R. P. 871 of 1913.

C. P. Code, S. 115—Revision—Religious Endowments Act S. *10—Appointment of member to fill vacancy in the committee—Nature of proceedings.*

Where a District Judge appoints a person to fill up a vacancy in the Committee under S. 10 of the Religious Endowments Act, his proceedings do not constitute "a case decided" within S. 115, C. P. Code. The District Judge is not bound to to take evidence in proceedings under S. 10. of the Religious Endowments Act and it is not competent to the High Court to interfere in revision with the appointment by the District Judge, on that ground.

T. R. Ramachandra Iyer for Petitioner.

S. Srinivasayangar and *K. Rajah Iyer* for Respondent.

Coutts Trotter, J. K. S. Iyangar, J. 1915, September 20. A. S. 98 and 223 of 1910.

Hindu Law—Mortgage by grandfather for immoral debts—Onus on grandson of proving creditors knowledge of immoral character of debts.

In a suit by a son or grandson of a Hindu to set aside a mortgage by his father or grandfather on the ground that the debt for which mortgage was created was for immoral purposes, the plaintiff is not only bound to show the connection between the defendant and the immorality but he should also show that the creditor knew that the amount borrowed was to be utilised for the immoral purpose.

Maharaj Singh v. *Balwant Singh* [1], and *Chandra Deo Singh* v. *Mata Prasad* [2], not followed.

N. Rajagopalachari for the Appellant.

M. O. Parthasarathy Aiyangar and *T. Rangachariar* for the Respondent.

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1. (1906) I. L. R. 28 A. 508, at 529 and 541.
2. (1909) I. L. R. 31 A. 176 F. B. at 196.

NOTES OF RECENT CASES.

Sadasiva Ayar and Napier, JJ. 1915, September 22. — C. M. A. No. 313 of 1913.

Civil Procedure Code, O. 34 R. 8—Preliminary decree by Appellate Court—Extension of time for payment of mortgage money—Application to be made to the Court of first instance—Order extending time, if appealable.

There is no appeal against an order extending the time fixed for payment of the mortgage money in a preliminary decree for redemption. Even where the preliminary decree has been passed by the Appellate Court, an application for extention of the time fixed for payment of the mortgage money should be made only to the Court of first instance. The application in this case having been made to the Appellate Court, the High Court directed the Appellate Court to return the application to be presented to the Court of first instance.

S. Varadachariar for Appellants.

G. S. Ramachandra Aiyar for Respondents.

Coutts-Trotter and Srinivasa Ayangar, JJ. 1915, October 12. — A. S. No. 47 of 1914.

Hindu Law—Joint Family—Release by one member—Formalities.

It is competent to a member of a joint Hindu family to relinquish his interest in the family properties orally, without any instrument in writing registered.

T. R. Venkatarama Sastri, for the Appellant.

G. S. Ramachandra Aiyar, for Respondents.

Sir John Wallis, Chief Justice, Sadasiva Aiyar, J. Seshagiri Aiyar, J. 1915, October 14. — FULL BENCH. A. S. No. 74 of 1911. and L. P. A. 51 of 1914.

Hindu law—Joint family—Unambiguous declaration by one member to be separate from the others—Whether effects a severance of the Status of joint family—Filing of a plaint by one member for his share—operates as a severance.

A definite and unambiguous indication by one member of a joint family of intention to separate himself, from the others and

enjoy his share in severality effects a severance of the status of the joint family so far as he is concerned irrespective of the consent of the other members.

I. L. R. 35 A. p. 80 followed.

A plaint in a suit for partition by one member of a joint family asking for his share operates as a severance of the joint family.

K. N. Aiya, for the Appellant in A. S. 74 of 1913.

B. Sitarama Rau, for the Respondents.

A. Krishnaswami Aiyer, for the Appellants.

S. Srinivasa Aiyangar, G. S. Ramachandra Aiyar, for the Respondents.

Wallis, C. J.
Abdur Rahim and
Seshagiri Iyer, JJ.
1915, October 18.

FULL BENCH.
A. S. No. 327 of 1913.

Registration Act Ss. 17 (b) and 49—Petition to Collector—Recital of gift — Petition, if admissible in evidence, without registration.

A petition to the Collector for change of patta in the name of the donee of certain properties, though it contains a recital about the gift having been previously made, does not require registration. Therefore S. 49 of the Registration Act does not render it inadmissible in evidence.

N. Chandrasekhara Iyer for Appellant.

T. Narasimha Iyengar for Respondent.

Wallis, C. J.
Abdur Rahim, J.
and Seshagiri Iyer, J.
1915, October 18.

FULL BENCH.
S. A. No. 242 of 1914.

Madras Act (III of 1905) Ss. 7 and 14—Notice by Government under S. 7—Cause of action—Limitation.

A mere notice by Government under S. 7 of Madras Act III of 1905, does not give a cause of action to the person on whom it is served. If, however, any effective proceedings are taken under the Act, any suit for any relief based on such proceedings must be brought within 6 months from the date of such proceedings.

The Government Pleader, for Appellant.

C. V. Anantakrishna Iyer, for Respondent.

NOTES OF RECENT CASES.

Ayling, J.
1915 October, 4.

Cr. R. C. No. 368 of 1915.

Criminal Procedure Code—Ss. 145, 147—Applicability—Dispute relating to management of temple and right to do pooja therein if within scope of section.

A dispute relating to the management of a temple and the right to do pooja therein is not covered by S. 147 of the Criminal Procedure Code.

[27 M. L. J. 587, 29 M. 237, 11 M. 323, 24 B. 527, dissented from.]

[37 C. 578 followed].

Such a dispute may be brought under S. 145 of the Code; and the Magistrate in awarding possession to one of the parties is not bound to find inclusive possession in his favour but may reserve certain possessory rights to the other party.

A. Anantarama Aiyar for Petitioner.

Public Prosecutor and *T. Narasimha Aiyangar* for Counter-petitioner.

Abdur Rahim and Spencer, JJ.
1915 October, 4.

C. M. S. A. No. 18 of 1914.

Execution of decree—Limitation—Uncertified part-payment if can be relied upon to save—Statement in execution application of a prior part-payment if sufficient compliance with O. 21 R. 2 of Civil Procedure Code.

A decree-holder in order to escape the bar of limitation may rely upon a part-payment made within three years prior to his execution application, though such part-payment had not been certified before the execution application. The statement in the execution application of the prior part-payment is sufficient compliance with O. 21 R. 2 of the Code of Civil Procedure.

K. Narayanaswami Aiyar for *T. Natesaiyar* for Appellant.

S. Varadachariar for Respondent.

Spencer and Phillips, JJ. 1915 October 12. S. A. No. 591 of 1914.

Evidence Act S. 92 (4)—Mortgage—Discharge by subsequent oral sale, if can be pleaded—Possession of mortgagee, if adverse, after sale.

Per *Spencer, J. (Phillips, J.) contra.* It is not permissible to prove a discharge of a registered mortgage, by an oral sale of a portion of the mortgaged property. The possession of the vendee after such oral sale, is only that of a mortgagee, and is not adverse to the mortgagor.

23 M. L. J. 339 referred to.

G. S. Ramachandra Iyer for Appellant.

P. Narayanamurti for Respondent.

Sadasiva Aiyar and Napier, JJ. 1915 October, 14. O. S. A. No. 98 of 1913.

Presidency Towns Insolvency Act, 1909—S. 56—Fraudulent Preference—Payment to accommodation acceptor of hundy drawn against him.

Payment by an Insolvent to an accommodation acceptor of a hundy drawn against the latter is not a payment to a "creditor" within the meaning of the Presidency Towns Insolvency Act so as to make it a fraudulent preference.

Where the Insolvent drew a hundy in favour of his daughter and the drawee paid the amount after an act of bankruptcy committed by the Insolvent but before adjudication, *Held* the payment could not be set aside and the authority was not revoked by the mere act of insolvency.

L. A. Govindaraghava Aiyar, T. Ramachandra Rao and *A. N. Sitarama Sastri* for Appellant.

M. D. Devadoss for Respondent.

Abdur Rahim and Spencer, JJ. 1915 October, 18. C. M. A. No. 351 of 1914.

Mesne Profits—Interest on—Decree providing for interest on past but not on future mesne profits—Discretion of Court to allow or not interest on profits after 3 years from date of decree.

Where a decree provided for interest on past mesne profits but did not provide for interest on mesne profits for the period

subsequent to suit, *held* that the Court had a discretion to allow or not interest on mesne profits after 3 years from the date of the decree.

[27 C. 951 P. C., referred to.]

[33 C. 329 ; 12 C. W. N. 285 considered.]

S. Muthiah Mudaliar for Appellant.

T. Narasimha Aiyangar for Respondent.

Ayling and Phillips, JJ.
1915 October 22. — Crl. M. Petn. No. 342 of 1915.

Criminal Procedure Code S. 195—Perjury—Contradictory statements in depositions—Sanction to prosecute.

Where there are two radically contradictory statements in two distinct depositions by the same person, there is no *locus penitentiae* to the deponent and a sanction for prosecution of the deponent for perjury ought to be given.

The Crown Prosecutor for Petitioner.

S. Gurusami Chetti for Counter-petitioner.

Ayling and Phillips, JJ.
1915, October 22. — S. A. No. 1082 of 1913.

Landlord and Tenant—Payment of enhanced rent for a long time—Presumption—Implied Contract—Consideration—Custom—Change of case on appeal, not to be allowed.

Where a landlord sues for enhanced rent on the basis of a custom, he cannot, on appeal, rely on an implied contract to pay the rent, inferable from the payment of such rent for a long period of time.

Payment for a number of years of enhanced rent, may be evidence of an *agreement* to pay at that rate, but there is no irrebuttable presumption that the agreement was also supported by consideration, so as to make it a binding contract for all time.

28 M. 444; 28 M. L. J. 136, referred to.

S. Sundararaja Aiyangar for Appellant.

N. Chandrasekhara Iyer, (with) *A. Krishnaswami Iyer* for Respondent.

The Chief Justice, Abdur Rahim and Seshagiri Iyer, JJ. 1915, October 22. C. R. P. No. 338 of 1914.

Limitation Act, Art. 80—Promissory note—Covenant not to sue for a limited time—Limitation, when commences—Covenant if a bar to a suit within the time.

When a promissory note payable on demand is accompanied by a writing fixing the time for payment, limitation as between the parties commences to run only after the expiry of the period fixed, under Art. 80 of the Limitation Act.

A covenant accompanying a promissory note, not to sue for a limited time, is a bar to a suit on the promissory note within that time.

Somasundaram Chettiar v. *Narasimhachariar* [1], overruled.

B. Sitarama Rao for Petitioner.

S. Ranganadha Iyer for Respondent.

The Chief Justice and Seshagiri Aiyar, J. 1915 October, 25. A. S. No. 47 of 1914.

Hindu law—Partition—Partial partition—Presumption.

Per Seshagiri Aiyar, J. (*Wallis, C. J.* dubitante). Where a partition deed between a father and son in terms purports to effect an actual division of only some of the items of the joint family properties, the presumption is that they intend to become divided in status with regard to all the family properties, and not merely with reference to the properties specified.

Per Seshagiri Aiyar, J.—Partial partition is unknown to the ancient Hindu law and under the law as recognised by judicial decisions, it has to be specially pleaded and proved.

T. Rangachariar and *K. V. Krishnaswami Aiyar* for the Appellants.

S. Srinivasa Iyengar and *A. Krishnaswami Aiyar* for the Respondents.

The Chief Justice and Seshagiri Aiyar, J. 1915 October, 25. A. S. No. 203 of 910.

Compromise—Reversioner—Suit by to impeach will of last male owner—Compromise—Neither dishonest nor fraudulent—How far binding on de facto reversioners.

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1. (1905) I. L. R 29 M. 212.

Per Chief Justice.—A compromise by one reversioner in a suit instituted by him impeaching a will put forward by the sister's son of the last male owner in conjunction with the mother who was representing the estate on the ground of intestacy is not binding on the de facto reversioners when the reversion opens.

I. L. R. 24 A. 92 followed.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for Appellants.

S. Srinivasa Iyengar, *A. Krishnaswami Aiyar* and *C. Padmanabha Iyengar* for Respondents.

The Chief Justice and Seshagiri Iyer, J. 1915 October, 25. — S. A. No. 271 of 1914.

Specific Performance—Contract of Sale—Suit for execution of sale-deed and for possession against vendor and his usufructuary mortgagees—Misjoinder of causes of action—Practice.

In a suit for specific performance of a contract to sell land it has been the practice of this Court to decree not only the execution of a conveyance but also delivery of possession to the vendee. This however could be done only as against the vendor and not as against the usufructuary mortgagees of the vendor, who are not proper parties to the suit.

K. Rajah Iyer for *S. Srinivasa Aiyangar* for Appellant.

V. Ramadoss for Respondent.

Sadasiva Aiyar and Napier, JJ. 1915 October, 25. — S. A. No. 2613 of 1913.

Civil Procedure Code S. 2 (ii)—Legal representative—Suit by creditor of a deceased person—Will—Executor—Legatee—Suit against persons in wrongful possession of estate—Decree—Execution—Rights of Auction-purchaser—Legatee, if bound by execution sale.

A debtor died leaving a will whereby he appointed an executor and bequeathed some property to the plaintiff. One of the creditors of the deceased brought a suit against the persons in wrongful possession of the estate of the deceased, on a debt due by him, and obtained a decree. In execution of the decree, the property bequeathed to the plaintiff was sold and purchased by the defendant. Neither the plaintiff nor the executor was a party to the suit and the proceedings in execution. In a suit by the plaintiff to recover possession of the property from the defendant, *Held* that the estate of the deceased was properly

represented in the creditor's action and that the defendant had acquired a good title to the properties purchased by him. In the absence of proof of fraud or collusion between the creditor and the representatives of the estate in the prior suit, it was not open to the plaintiff to set aside the prior proceedings and recover possession of the property in the hands of the defendant.

Ramaswami Chetty v. *Oppilamani Chetty* [1] followed. *Kaliappan Servaigaran* v. *Varadarajulu* [2] distinguished.

G. S. Ramachandra Iyer for Appellant.
T. V. Muthukrishna Iyer for Respondent.

Wallis, C. J. and *Seshagiri Iyer, J* — A. S. No. 355 of 1913.

Religious Endowments Act, (XX of 1863) Ss. 3, 4, 12 and 14—Hindu Temple—Scheme—Jurisdiction of Court, to frame—Temple Committee, powers of—Existence of Committee, no bar to a scheme by court.

Courts in India have jurisdiction to frame a scheme for the proper management of religious institutions even in cases coming within the operation of the Religious Endowments Act. This power over religious institutions inheres in the Court as *parens patriae* and is similar to the powers of the Court of chancery in England, over charitable trusts, subject to the ordinary visitorial jurisdiction. Act 20 of 1863, is intended to cover all classes of religious institutions in India and the Srirangam Temple falls either under S. 3 or under S. 4 of the Act.

The Temple Committee being a statutory body having statutory powers, any scheme framed by the Court must not infringe the clear provisions of the Act.

Per Chief Justice.—Act 20 of 1863 is very general in its terms and ought to be construed very liberally. The Temple Committee are the successors of the Board of Revenue and there is no warrant for curtailing their powers under the Act, in spite of the decisions which restrict their powers.

Per Seshagiri Iyer, J.—On the principle of *Stare decisis*, the powers of the Temple Committee must now be taken to be limited, but that is no ground for withholding from them the powers they do possess under the Act.

T. V. Venkatarama Iyer for Appellant.
P. R. Ganapati Iyer for 1st Respondent.
T. Narasimha Aiyangar for 3rd Respondent.

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1. (1909) I L. R. 33 M, 6.
2. (1909) I L. R. 33 M. 75.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Napier, JJ.
1915, October 26.

S. A. No. 2783 of 1913

Vendor and purchaser—Covenant for title—Breach—Date of—Date of sale or of eviction of vendee.

A breach of a covenant for title attached to a conveyance either expressly or by statute occurs once for all on the date of the sale-deed itself and not on the date of the eviction of the vendee by a person claiming under title paramount.

[31 M. 452 (1913) M. W. N. 1029 followed].

M. Patanjali Sastri for P. *Narayanamurti* for Appellant.

T. V. Venkataramaiyar for Respondeut.

The Chief Justice, and Seshagiri Iyer, J.
1915 October, 27.

A. S. No. 94 of 1912.

Hindu law—Adoption—Consent of Sapindas—Degree of relationship—Nature of consent required to validate adoption by widow—Omission to consult effect.

In the case of an adoption by a Hindu Widow, the assent of the sapindas is a substitute for the authority of the husband and *prima-facie* the consent of all those who are in the direct line of succession to the deceased husband must be obtained. Where a Hindu Widow adopts with the consent of the majority of the sapindas of her husband, but without consulting a few of the nearest sapindas, the adoption is invalid.

Quaere: Whether an authority to adopt given to the widow by the then nearest reversioner spends itself out by lapse of time.

Subramanyam v. *Venkamma* [1] followed.

T. Rangachariar and *V. Ramdoss* for Appellants.

S. Srinivasa Ayangar and *V. Ramesam* for Respondents.

The Chief Justice, Seshagiri Iyer, J.
1915 October, 27.

A. S. No. 113 of 1910.

Madras Irrigation Cess Act, (VII of 1865) S. 1—Madras Land Encroachment Act (III of 1905) S. 2—River flowing through Zemindari—Zemindar, owner of bed and banks at the place of diversion—Government, if can levy cess.

Where both the banks and the bed of a river belong to the Zemindar, at the place where the diversion takes place, the

1. (1903) I. L. R., 26 M. 627.

Government cannot be said to be the owner of flowing water at the place of diversion so as to entitle them to levy cess under S. 1 of Act VII of 1865, on the lands irrigated by the water so diverted from the river.

The Secretary of State for India v. *Jankiramayya* [1], Referred to.

S. 2 of Act III of 1905 is declaratory and governs the interpretation of S. 1 of Act VII of 1865.

The Government Pleader for Appellant.

V. Ramesam for Respondent.

Sadasiva Aiyar and Napier, JJ. *1915 October, 27.* — S. A. Nos. 2275 to 2278 of 1914.

Limitation Act, Art. 120 & 144—Suit, by heir of deceased Mahomedan for recovery of his share of movable and immovable —Limitation—Starting point.

Where a Mahomedan dies intestate, the estate is at once vested in his heirs as tenants-in-common. Where one of the heirs sues to recover his share of the movable and immovable properties from his co-heirs, Art. 120 is applicable to the claim for movables and Art. 144 to the claim for immovable property. Limitation in both cases begins to run only from the date when the plaintiff was actually ousted by his co-heirs.

Khadersa Haji Bappu v. *Puthen Veetil Ayissa Ummah* [2], Referred to.

M. D. Devadoss for Appellant.

T. R. Ramachandra Iyer and *N. A. Kishna Iyer* for Respondents.

Coutts Trotter and Srinivasa Ayangar, JJ. *1915 October, 29.* — A. S. No. 302 of 1913.

Joint Mortgagees—Payment to one, if a good discharge against all.

Where there are several persons who on the face of the instrument of mortgage are joint-creditors, payment to one of them is a good discharge as against all.

Annapurnamma v. *Akkayya* [1] followed.

S. Muthiah Mudaliar for Appellant.

V. Visvanatha Sastri and *A. Krishnaswami Iyer* for Respondent.

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1. (1915) 29 M. L. J. 389. (F. B.) 2. (1910) I. L. R. 34 M. 511.

NOTES OF RECENT CASES.

Sadasiva Aiyar, J.
Napier, J.
1915 October, 27.
S. A. No. 90 of 1914.

Limitation Act of 1908, Art. 132—Charge—Suit for enforcing—Kuri for fixed period—Discontinuance before expiry of period—Suit by subscriber for loss sustained by—Limitation—Cause of action—Agreement by president charging his property with payment of loss—Effect.

Where an agreement executed by the president of a kuri started in 1890 provided that the kuri was to be continued till 1899 by the president himself or his heirs and charged the property of the president for any loss sustained by them by reason of the discontinuance of the kuri before the period, *held*, in a suit by a subscriber for the recovery of the loss sustained by him by reason of the discontinuance of the kuri in 1893 and for having it charged on the property of the president, that the cause of action arose on the date of the discontinuance and not on the date of the expiry of the term of the kuri. On the date of the discontinuance of the kuri, the kuri contract became impossible of performance.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

Sir John Wallis, C. J.
Seshagiri Aiyar, J.
1915 October, 28.
A. S. No. 35 and 422 of 1914.

Limitation Act of 1908, S. 6 cls. (3) and (4)—"Legal representative."—Hindu Law—Minor father and his undivided minor son—Latter if legal representative of former—Minor—Alienation of property of, by guardian—Death of minor during minority leaving undivided minor son—Suit by son to set aside alienation—Limitation.

Where the guardian of a Hindu minor alienated the minor's property in 1880, and the minor died in 1893 while still a minor and leaving behind him an undivided adopted son who was also a minor, and the latter instituted a suit in 1911, within 3 years of his attaining majority, to set aside the alienation, *held* that the suit was not barred by virtue of cls. 3 and 4 of S. 6 of the Limitation Act of 1908. The undivided minor son is the legal representative of his minor adoptive father within the meaning of the said clauses.

T. R. Ramachandra Aiyar for Appellant.

S. T. Srinivasagopalachariar and *R. Satyamurti Aiyar* for Respondents.

Chief Justice and Ayling, JJ. 1915 October, 29. S. A. No. 769 of 1914.

Madras Estates Land Act, S. 6—Applicability—Transferee from yearly tenant against whom decree in ejectment was got after Act, if entitled to benefit of Section.

Where, in a suit in ejectment brought by a landlord against a tenant on the ground that the defendant did not either pay rent to the plaintiff or exchange pattas and muchilikas with him, the defendant pleaded that the land was inam but it was found that the land was zeroyati land and that the defendant was transferee from the original tenant who was only a yearly tenant and against whom a decree in ejectment had been obtained after the Act and while the defendant was in possession, *held,* that the defendant was entitled to the benefit of S. 6 of the Act as his transferor if he had continued in possession till July 1908, would have acquired occupancy rights.

B. N. Sarma and K.S. Aravamuda Aiyangar for Appellants.

Respondent not represented.

Sadasiva Aiyar, J. Napier, J. 1915, November 1. S. A. No. 329 of 1914.

C. P. Code, S. 11—Mortgage—Decree for sale—Provision in decree, for redemption within a fixed time—Subsequent suit by mortgagor for redemption, barred.

Where in a suit for sale by a mortgagee a decree was passed entitling the mortgagor to get possession of the mortgaged property on payment of the mortgage money within a time fixed by the decree, a subsequent suit for redemption by the mortgagor is barred by *res judicata.*

T. M. Krishnaswami Aiyar for Appellant.

K. R. Rangaswami Aiyangar and *P. V. Parameswara Iyer* for Respondents.

NOTES OF RECENT CASES.

Coutts-Trotter and Srinivasaiyangar JJ. 1915 November 1 — A. S. 217 of 1914.

Limitation Act of 1908—Art. 93—"Attempt to enforce instrument"—Meaning—Hindu Law—Reversioner—Suit for declaration that will of last owner was a forgery—Limitation—Succession certificate Act—Application by widow of last owner under—Widow basing her claim on being nearest heir but mentioning husband's will in her favour—Notice of petition to reversioners—Effect.

Where a childless Hindu widow presented a petition under the Succession Certificate Act, for the grant of a certificate entitling her to collect the debts of her husband, basing her claim on the fact of her being the nearest heir under the Hindu Law, but also incidentally mentioning the existence of a will of her husband in her favour, and notice of her petition was given to the near relatives of her husband, *held*, in a suit subsequently brought by the near relatives of her husband above-mentioned for a declaration that the said will was a forgery, that the mention of the will in the petition was not an attempt to enforce it against the near relatives within the meaning of Art. 93 of the Limitation Act and that the suit was not barred because it was instituted more than 3 years after the date of the said petition.

P. Narayanamurti and P. Somasundaram for Appellant.

T. Rangachariar and B. Narasimha Rao for Respondents.

Sadasiva Aiyar and Napier, JJ. 1915 November, 2. — S. A. No. 341 of 1914.

Practice—Second appeal—Remand by High Court—Lower Appellate Court, if can disturb findings of fact—Civil Procedure Code O. 21 R. 46—Prohibitory order—Suit for damages—Limitation—Limitation Act, Art. 29, 36 and 42.

When in second appeal, the High Court reverses and remands the case to the District Judge for disposal, it is not open to the successor-in-office of the Judge who originally decided the case to re-open the findings of fact given by his predecessor.

Where movable property in the possession of a third person who is not the judgment-debtor is attached by a prohibitory order under O. 21 R. 46 (1) (c) (i), Civil Procedure Code the prohibitory

order is not an injunction within the meaning of Art. 42 of the Limitation Act.

A suit for damages caused by such wrongful attachment will be governed by Art. 29 or 36 and not by Art. 42 of the Limitation Act.

The Limitation Act and the Civil Procedure Code being Acts in *pari materia*, words like "injunction," "arrest," etc., must be understood in the sense in which they are used in the Civil Procedure Code.

V. Ramdoss and *K. G. Sarangaraja Iyengar* for Appellants.

T. Rangachariar and *M. Purshotam Naidu* for Respondents.

Sadasiva Aiyar and Napier, JJ.
1915 November, 2.

S. A. No. 907 of 1914.

Alyasantana Law—Self-acquisition, devolution of.

The self-acquisition of an Alyasantana male or female goes to all the members of the branch to which he or she belonged and not merely to the nearest relations among them.

Held, accordingly, that a pre-deceased maternal aunt's children took along with the maternal aunt in existence at the death of the acquirer.

J. L. Rosario and *K. P. Lakshmana Rao* for Appellant.

B. Sitarama Row for Respondent.

Sadasiva Aiyar J.
Napier, J.
1915 November, 2.

S. A. No. 92 of 1914.

Limitation Act, Art. 12—Execution Sale—Suit to set aside—Minor defendant not impleaded as major though he attained majority before decree—Decree and execution proceedings not void—Civil Procedure Code O. 32 Rr. 12 and 13.

Where a minor defendant attained majority sometime prior to the passing of the decree in a suit, but the decree and the execution proceedings went on the footing that the defendant was still a minor represented by his guardian-ad-litem, *Held*, that the decree, and the execution-sale in pursuance thereof, were not void as against the minor and that it was the duty of the minor to have intervened in the proceedings on his attaining majority. Though in the case of minor defendants, there is no provision in the Civil Procedure Code corresponding to O. 32 Rr. 12 and 13, the principle of these rules applies to them also. A suit to set aside an

execution sale under the above circumstances is governed by Art. 12 of the Limitation Act.

A. Krishnaswami Aiyar for Appellant.

T. Prakasam for Respondent.

Sadasiva Aiyer, and Napier, JJ. 1915 November, 2. — S. A. No. 907 of 1914.

Aliyasantana Law—Self-Acquisitions of member of—Devolution—Branch, Tarwad or nearest heir.

The self-acquisitions of a member of an Alayasantana family devolve on his death on the branch and in the absence of the branch on the tarwad and not on the nearest heir.

C. Madhavan Nair, J. L. Rozario, K. P. Lakshmana Rao, for Appellant.

H. Balakrishna Rao, B. Sitarama Rao, and *K. Y. Adiga,* for Respondent.

Ayling and Phillips JJ. 1915 November, 2. — S. A. Nos. 1089 to 1091 of 1914.

Madras Act. II. of 1892 as amended by Act of 1900. S. 4—"Proprietor"—Meaning—Receiver of Nidadavole Estate a "proprietor" for making nominations of village officers under S. 15 of Madras Act II, of 1894.

Held, The Receiver of the Nidadavole Estate is a "proprietor" within the meaning of S. 4 of Madras Act II, of 1894 as amended by the Act IV of 1900 for the purpose of making nominations of village officers under S. 15 of Madras Act II of 1894.

Government Pleader with P. Somasundaram for Appellant.

P. Nagabhushanam, for *L. A. Govindaraghavaiyar,* and *V. Ramesam* for Respondent.

Coutts-Trotter and Srinivasa Aiyangar, JJ. 1915 November, 3. — A. S. Nos. 103, 131 of 1914.

Marumakatayam Law—Person governed by—Will by—Bequest in favour of eldest son—Bequest if enures to benefit of family of legatee.

Held: a bequest by a person governed by the Marumakatayam law in favour of his eldest son does not enure to the benefit of the family of which the legatee is the eldest member and manager.

C. V. Ananthakrishna Aiyar and P. S. Narayanaswami Aiyar and *C. Madhavan Nair* for the Appellants in both Appeals.

T. R. Ramachandra Aiyar and *N. A. Krishnna Aiyar* for Respondents in both Appeals.

Sir John Wallis, C. J.
Seshagiri Aiyer, J. — A. S. No. 20 of 1913.
1915 November, 4.

Transfer of Property Act S. 118—Exchange of land—Absence of registered deed—Change of possession—Payment of money for excess area—Erection of costly buildings — Part-performance, doctrine of—Estoppel—Statute.

The defendant was put in possession of the suit land under an unregistered exchange deed executed between him and the plaintiff. Subsequently the defendant erected a costly superstructure worth Rs. 40,000 on what was admittedly his own land and on the suit land which he had obtained in exchange from the plaintiff. As the building was about to be raised the plaintiff received a sum of Rs. 500 from the defendant on the ground that the land which the former got in exchange was deficient in area. The plaintiff though aware of the erection of the superstructure on the suit land did not object to it at the time. The plaintiff subsequently sued to recover possession of the suit land on the ground that no title had passed to the defendant, the instrument of exchange being unregistered.

Held, Per *Wallis, C. J.*:—On the principle of *Ramsden* v. *Dyson* [1], the plaintiff was estopped from asserting his title to the suit property and his suit ought to be dismissed. It is doubtful if the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [2], is good law having regard to the very wide language of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Gangali* [3].

Per *Seshagiri Iyer. J.*:—The plaintiff was entitled to succeed though he was liable to pay compensation to the defendant for the loss sustained by the latter.

The decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [2], is still good law even after the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Gangali* [3].

The defendant could not rely on any title by estoppel as that would enable him to acquire a title contrary to the express provisions of S. 118 of the Transfer of Property Act.

S. Srinivasa Aiyangar and *K. Rajah Aiyer* for Appellants.

A. Krishnaswami Aiyer for Respondents.

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1. L. R. 1 H. L. 141. 2. (1904) I. L. R. 29 M. 336.
3. (1915) I. L. R. 42 C. 801=28 M. L. J. 548.

Sadasiva Iyer J.
Napier, J.
1915 November, 5.

A. S. No. 9 to 14 of 1913.

Hindu Law—Partition—Partial partition—Presumption—Burden of proof—Single cause of action for partition—Second suit for partition, when maintainable.

Per Napier, J. :—Though a co-parcener cannot enforce a partition of a part only of the common lands leaving the rest undivided, and although the entire property must be included in the partition, yet, if by mistake or consent of the co-parceners a partition of a portion only of the estate is made, whether by decree of court or otherwise, there is no reason why the court should not grant a division of the remainder at the instance of one or more of the co-parceners.

Per Sadasiva Aiyar, J. :—Partial partition is unknown to the Hindu Law. Once a partition has been made, the presumption is strong that the severance was complete and the onus of rebutting it is on the person claiming a fresh partition. Except on the ground of fraud, mistake, or accident a partition once made cannot be re-opened. There is a only a single cause of action for partition and successive suits for partition are barred both under S. 11 and O. 2 R. 2 of the Civil Procedure Code.

K. Ramanath Shenai for Appellants.

T. Prakasam for Respondents.

Sadasiva Aiyar, and
Napier, JJ.
1915, November, 5.

S. A. No. 971 of 1914.

Evidence Act—S. 92 Proviso (1)—Mortgage—Wrong description of property—Evidence to show property really intended to be mortgaged—Admissibility—Specific Relief Act—S. 31—Rectification—Suit for, when necessary.

Where, in a suit by a puisne mortgagee, the question was raised as to whether one of the defendants held a prior mortgage of the suit property, *held* it was open to that defendant to adduce evidence to show that, notwithstanding the wrong description of the property in the deed of mortgage, the suit property was intended to be mortgaged. Such evidence is admissible under S. 92 Proviso (1) of the Evidence Act. It is not necessary for the prior mortgagee to obtain a rectification under S, 31 of the Specific Relief Act

except in cases where the rights of innocent third parties are affected.

V. Ramadoss for Appellant.

T. Ramachandra Rao for Respondent.

Sadasiva Iyer and Napier, JJ. *1915 November, 8.* } S. A. No. 1408 of 1914.

Lease for term—Deed executed by lessee—Provision for renewal—Ejectment suit after expiry of term—Lessee if entitled to resist suit on strength of covenant for renewal—Absence of registered instrument in pursuance of covenant for renewal—Effect.

Where a lease-deed, executed in favour of the District Board of Tanjore, was for a period of 10 years and provided for a renewal by a clause which ran as follows:—"I shall on the expiry of the stipulated period again execute a rent deed in this manner. In default to execute as aforesaid you may yourselves take possession of the aforesaid site (*i.e.* the site leased);" *held,* in a suit brought after the expiry of the period fixed for the ejectment of the lessee, that, assuming that the alleged covenant for renewal was enforceable against the lessor, the lessee could not resist the suit on the strength thereof so long as he had not in his favour a registered instrument entitling him to continue in possession after the period fixed and that his remedy, if any, was to sue for specific performance of the covenant for renewal.

13 M. L. J. 217; 29 M. 336; 30 M. 300 followed.

L. A. Govindaraghava Aiyer for Appellants.

V. Ramasawmy Aiyengar for Respondents.

Sadasivayar and Napier JJ. *1915 November, 8.* } S. A. 841 of 1914.

Mortgage—Kanom—Lease by Kanomdar—Surrender to jenmi—Lessee in possession—Ejectment.

A *Kanomdar* leased out the land on a yearly tenancy and subsequently received the *Kanom* amount and surrendered the property to the *jenmi.* The lessee, however, continued in possession for more than 12 years after the surrender of the *Kanom. Held* (1) that it was within the power of the *Kanomdar* to let out the land on a yearly tenancy (2) that the relationship of landlord and tenant was created between the *jenmi* and the tenant in possession, after the surrender of the *Kanom,* and (3) that it was open to the *jenmi* to terminate the tenancy by a proper notice, and thereafter enter into possession of the land.

P. Appu Nair for Appellant.

C. V. Ananthakrishna Ayar for Respondent.

NOTES OF RECENT CASES.

Coutts-Trotter and Srinivasa Aiyangar, JJ. 1915 November, 9.

A. S. No. 91 of 1914. (Memo of Objections.)

Hindu Law—Partition—Minor, when entitled to re-open—onus—*Family arrangement.*

A partition made during the minority of one of the members of a joint Hindu family will be valid and binding on the minor if his interests were represented by his guardian or some one acting on his behalf. If the minor seeks to re-open the partition, the *onus* of proving any invalidating circumstance is upon him.

A family arrangement will be upheld by Courts even though some of the parties thereto retained some property which the Court finds they were not solely entitled to. The Court does not in such cases consider narrowly the *quantum* of consideration.

B. Somayya for Appellants.

L. A. Govindaraghava Iyer with *B. Narasimha Rao* for Respondent.

Sadasiva Aiyar and Napier, JJ. 1915 November, 10.

S. A. No. 1173 of 1914.

Transfer of Property Act S. 41—Bona fide *purchaser—Nature and scope of inquiry—Question of fact—Penalty—Compound interest at enhanced rate.*

The nature and extent of the inquiry which a *bona-fide* purchaser is required to make under S. 41 of the Transfer of Property Act, depend on the circumstances of each case. Where a bond provides 9 % simple interest till the date fixed for payment and 10½ % compound interest on default, the stipulation for enhanced interest is a penalty.

G. S. Ramachandra Iyer for Appellants.

T. V. Venkatarama Iyer for Respondents.

Coutts-Trotter and Srinivasa Aiyangar, JJ. 1915 November, 10.

A. S. No. 96 of 1914.

Evidence Act S. 92 (4)—Registration Act, S. 17 (v)—Registered lease—Unregistered agreement to cancel, on the happening of an event—Admissibility.

A sued for a declaration that a registered lease executed by him in favour of B was not binding on him and for cancellation

of the same. The suit was based on an oral agreement contemporaneous with the lease, which was subsequently reduced to writing and signed by B, but not registered. Under the agreement B agreed that the lease should be cancelled and that he would relinquish his rights thereunder by a registered deed, if he failed to procure a loan for A at a low rate of interest. B was unable to procure the loan as agreed. *Held* that A's suit should be decreed. The subsequent agreement did not require registration as it came within S 17 Cl. (v). of the Registration Act and S. 92, proviso (4) of the Evidence Act did not render it inadmissible in evidence.

P. Narayanamurti and B. Somayya for Appellants.

T. Rangachariar and K. Krishnaswami Iyengar for Respondents.

Wallis, C. J.,
Sadasiva Aiyar and
Seshagiri Aiyar, JJ.
1915 November, 10.

L. P. A. No. 61 of 1915.

Registration Act S. 49—Partition deed—Division of movables and. immovables—Deed inseparable — Inadmissibility in evidence, without registration.

Where an unregistered document purports to effect a partition both as regards movables and immovables and it is found that the parties did not contemplate a partition of movables as distinct from a partition of the immovables, *Held* that the document, being unregistered, was inadmissible in evidence, to prove a division both as regards movables and immovables.

A. Krishnaswami Iyer for Appellant.

S. Srinivasa Iyengar and *G. S. Ramachandra Iyer* for Respondent.

Sadasiva Aiyar and
Napier, JJ.
1915 November, 11.

S. A. No. 1575 of 1914.

Civil Procedure Code O. 34 Rr. (4) & (5)—Decree for sale—Marshalling—Right of purchaser of portion of the property—Frame of the decree.

A mortgagor sold a portion of the mortgaged property to A free of the mortgage and subsequently sold the remaining items to B who undertook to discharge the mortgage. B having failed to discharge the mortgage, the mortgagee brought a suit for sale,

Held that it was not obligatory on the Court to direct by its decree that the property in B's hands should be sold first before the properties in A's hands could be proceeded against.

31 M. 419 followed.

G. S. Ramachandra Iyer for Appellant.

K. Ramachandra Iyer and *S. T. Srinivasagopalachari* for Respondents.

Kumaraswami Sastri, J.
1915 November, 11.

C. M. P. No. 2755 of 1915.

Civil Procedure Code S. 151, O. 1 R. 10—Parties, addition of—Inherent power of Court.

A Court has inherent power to add a person as a party to a proceeding, suit, or appeal, if such a course is likely to avoid multiplicity of legal proceedings. Where a person, who had purchased in Court-auction certain properties which the Respondent decree-holder, in a pending appeal, had offered as security for restitution in respect of a money decree obtained by him and against which the appeal was pending, applied to be made a party respondent to the appeal, *held* that the High Court had jurisdiction to add him as a Respondent.

[12 C. L. J. 91; 22 Q. B. D. 666 followed.]

T. M. Krishnaswami Iyer for *G. S. Venkatarama Iyer* for Petitioner.

C. Kishnamachariar for Counter-petitioner.

Coutts-Trotter and Srinivasa Iyengar, JJ.
1915 November, 15.

A. S. No. 108 of 1914.

Hindu Law—Widow—Alienation of whole estate—Consent of reversioner—Estoppel.

Where a Hindu widow alienates the whole estate with the consent of the next reversioner given for consideration, however inadequate, the reversioner is estopped from contesting the validity of the alienation on the death of the widow.

T. R. Venkatarama Sastri and *C. V. Ananthakrishna Iyer* for Appellants.

T. Rangachariar and *S. Muthiah Mudaliar* for Respondents.

Sadasiva Aiyar and Napier, JJ.
1915 November, 16.

S. A. No. 741 of 1914.

Hindu Law—Widow—Alienation—Subsequent surrender—Re-marriage, Effect of.

A Hindu widow cannot by relinquishing her widow's estate in favour of the reversioners affect the validity of alienations made by her before such relinquishment. Such alienations though not binding on the actual reversioners, will be good during the widowhood of the alienor.

Quaere. What is the effect of the re-marriage of the widow on such alienations ?

26 M. 143 ; 1914 M. W. N. 735 referred to.

B. Narasimha Row for Appellants.

K. S. Ganesa Iyer for *G. Venkataramiah* for Respondents.

Kumaraswami Sastri, J.
1915 November, 16.

C R. P. No. 436 of 1914.

Inherent power—Court—Correction of mistake.

Every Court has got an inherent power to set aside an order passed by it under mistake. This power is independent of the Civil Procedeure Code and is exerciseable by a District Munsif acting under S. 73 of the Madras Village Courts Act.

G. S. Ramachandrier for Petitioner.

S. Muthiah Mudaliar for Respondent.

NOTES OF RECENT CASES.

Napier, J.
1915 September, 28. } C. R. P. No. 1005 of 1914.

Civil Procedure Code S. 20, Cl. (c)—Suit on a promissory note—Jurisdiction—Place of indorsement—Cause of action, where arises.

A suit on a promissory note is maintainable in a Court within the jurisdiction of which it was endorsed.

22 Q. B. D. 128 referred to.

B. Somayya for Petitioner.

V. Ramadoss for Respondent.

Kumaraswami Sastri, J.
1915 November, 10. } C. R. P. No. 688 of 1914.

Limitation Act of 1908 Art. 182—Execution of decree—Application in accordance with law—Joint decree-holders—Application by one of—Application not under O. 21, R. 15 of the Code of Civil Procedure.

An application by one of several joint decree-holders for the execution of the decree is an application in accordance with law within the meaning of Art. 182 of the Limitation Act, though it is not made under O. 21, R. 15 of the Code.

T. Ramachandra Rao for Petitioner.

C. S. Venkatachari for Respondents.

Chief Justice, Seshagiri Aiyar and Phillips, JJ.
1915 November, 23. } L. P. A. No. 386 of 1914.

High Court—Appellate Side Rules—Rule 75—Appeal posted for orders under—Power of Admission Court—Dismissal of appeal—Legality.

The Admission Court before which a Civil Miscellaneous appeal is posted for orders under Rule 75 of the Appellate Side Rules, High Court cannot dismiss the appeal. It can only extend the time fixed for payment or direct the appeal to be posted before a Bench.

T. Narasimha Aiyangar for Appellant.

L. A. Govindaraghava Aiyar for Respondent.

Chief Justice, Seshagiri Aiyar and Phillips, JJ. 1915 November, 24. C. M. S. A. No. 120 of 1912.

Foreign Court — Jurisdiction — Voluntary Submission — Appearing under protest but pleading on merits—Effect.

Where an application under S. 44 of the Civil Procedure Code, for execution of a foreign judgment was opposed by the judgment-debtor on the ground that the foreign Court had no personal jurisdiction over him inasmuch as he was not resident within the territorial jurisdiction of that Court but it appeared that, though he had objected to the jurisdiction of that Court when sued there, he had pleaded on the merits, *held* that he had voluntarily submitted to the jurisdiction of that Court.

2 M. 407, overruled.

T. R. Krishnaswami Aiyar for Appellant.

L. A. Govindaraghava Aiyar for *C. V. Anantakrishnier* and *T. K. Govinda Iyer* for Respondents.

Chief Justice and Seshagiri Aiyar, J. 1915 November, 25. O. S. Nos. 97 of 1914 and 14 of 1915.

Suit—Abatement—Partnership suit—Death of one of the defendants—Omission to bring his representative on record, Plaintiff becoming representative of deceased after order of abatement—Effect.

Where, in a partnership action, one of the defendants dies pending suit and his legal representatives are not brought on record, the whole suit abates and the fact that, subsequent to the order of abatement, the plaintiff becomes the representative of the deceased defendant does not affect the question.

31 C. 487 P. C. followed.

C. Venkatasubbaramiah and *C. P. Ramaswami Aiyar* for Appellant.

Venkatasubba Rao and *Radhakrishnayya* for Respondents.

Srinivasa Aiyangar, J.
1915 November, 16.

G. R. P. No. 475 of 1914.

Civil Procedure Code O. 9, R. 9, O. 17, Rr. 2 and 3—Suit, adjournment of, suo moto—*Absence of plaintiff and his witnesses—Application for adjournment by pleader—Dismissal of suit—Application to set aside.*

O. 17, R. 3 of the Civil Procedure Code is inapplicable to a case where the suit is adjourned, not at the request of a party, but by the Court owing to want of time. Where on such adjourned date, neither the plaintiff nor his witnesses were present, but his pleader merely asked for an adjournment which was refused and thereupon expressed his inability to conduct the case further with the result that the suit was dismissed. *Held,* that the order of dismissal was in effect one under O. 9, R. 8 and that the plaintiff could apply to set aside the dismissal under O. 9, R. 9 C. P. Code.

L. A. Govindaraghava Aiyar for Petitioner.

N. S. Rangaswami Aiyangar for Respondent.

Wallis, C.J.,
Seshagiri Aiyar, J.
Phillips, J.
1915 November, 22.

L. P. A. No. 50 of 1914.

Hindu Law—Joint Family—Self-acquisition—Rights of sons of the acquirer—Living together, effect of.

Where it is found that a Hindu father acquired properties by trade without any nucleus of ancestral property, the mere fact that he lives with his sons and maintains them in the same family-house will not give any right to the sons in the acquisitions of his father.

T. Rangachariar for Appellant.

W. V. Rangaswami Aiyangar for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 November, 23.

S. A. No. 2661 of 1913.

Madras Estates Land Act—Tanjore Palace Estate, if within the Act.

The "Tanjore Palace Estate" is not an estate within the meaning of that term in S. 3, Cl. (2) of the Madras Estates Land Act, nor is it an "Inam" within the meaning of that term as understood in law.

T. R. Venkatarama Sastri for Appellant.

G. S. Ramachandra Iyer for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 November, 26.
C. M. A. Nos. 146 and 147 of 1914.

Madras Estates Land Act S. 192—Order of Remand, appeal against, if competent.

No appeal lies against an order of remand passed by the District Court in a suit under the Madras Estates Land Act.

G. S. Venkatarama Aiyar for Appellant.

T. V. Gopalaswami Mudaliar for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 November, 30.
C. M. A. No. 272 of 1914.

Civil Procedure Code Ss. 47 and 135—Appeal against order refusing to allow exemption from arrest to judgment-debtor—Maintainability.

An order under S. 135 of the Civil Procedure Code dismissing a petition by a judgment-debtor claiming exemption from arrest in execution of a decree against him, comes within S. 47 of the Civil Procedure Code and is appealable.

A. V. Visvanatha Sastri for Appellant.

K. S. Jayarama Aiyar for Respondent.

Sadasiva Aiyar and
Napier, JJ.
1915 November, 30.
S. A. No. 1399 of 1914.

Damages—Malicious abuse of process—Obtaining order of attachment before judgment—Malice—Absence of reasonable cause—Suit for damages, if sustainable.

The mere obtaining of an order of attachment before judgment, however maliciously, and however great the want of reason-

able and probable cause, will not give rise to a cause of action for damages in the absence of any seizure of goods in pursuance of the order of attachment.

T. V. Gopalaswami Mudaliar for Appellant.

G. S. Ramachandra Aiyar for Respondent.

Abdur Rahim, J.
Ayling, J.
1915 December, 1.

C. R. C. No. 573 of 1915.

Criminal Procedure Code S. 488—Scope of—"Unable to maintain itself"—Meaning—Malabar Law—Children entitled to maintenance from mother's Tarwad—Right for maintenance against father.

S. 488 of the Code of Criminal Procedure does not cover the same ground as the civil liability of a father. The words "unable to maintain itself" in the section are not confined to the case of physical inability to earn a livelihood.

Held:—Children who have a legally enforceable right to maintenance from, or are actually maintained by, their mother's Tarwad, are not entitled to an order for maintenance, under S. 488, against their father.

[1913 M. W. N. 907 dissented from.]

[19 M. 161 Rel. upon.]

C. Kunhiraman, Vakil for Petitioner.

Abdur Rahim, J.
Ayling, J.
1915 December, 2.

S. A. No. 816 of 1915.

Hindu Law—Adoption—Dancing girls—Absence of Criminal intent—Adoption valid.

The adoption of a daughter by a dancing girl is valid, if the adoption was not made for the purposes of prostitution.

K. S. Jayarama Aiyar for Appellants.

G. S. Ramachandra Aiyar for Respondents.

Kumaraswami Sastri, J.
Phillips, J.
1915 December, 3.

S. A. No. 1003 of 1914.

Malabar Law—Tarwad—Tavazhi—Karnavan of both, Deed by—Description of property as Tarwad property—Effect.

The fact that, in a deed executed by a person who is the Karnavan both of a Tarwad and of a Tavazhi, the property covered by it is described as his Tarwad property is not conclusive of the fact that the property belongs to the Tarwad as distinguished from the Tavazhi.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for Appellant.

A. Sundaram for Respondent.

Coutts-Trotter, J.
Srinivasa Aiyangar, J.
1915 December, 6.

A. S. No. 339 of 1913.

Limitation Act of 1908—*Art.* 106—*Partnership—Suit for account of dissolved partnership—Limitation—Cause of action—Partnership between managing member and one of junior members of joint Hindu family on one side and stranger—Death of junior member—Dissolution of partnership.*

Although, where the managing member of a joint Hindu family is a member of a trading corporation, the family property, including the shares of the other members, may be proceeded against in certain contingencies by the firm and its creditors, yet the family as such does not thereby become a partner.

"Partner" defined.

Where the managing member and one of the junior members of a joint Hindu family entered into a partnership with a stranger *held*, in a suit for accounts brought more than 3 years after the death of the junior member, that the suit was barred by limitation as the partnership was dissolved, by his death and on the date thereof.

[36 M. 185, 192 P. C. explained and distinguished.]

[28 M. 344 followed.]

C. V. Anantakrishna Aiyar for Appellant.

A. Krishnaswami Aiyar (*M. Patanjali Sastri* with him) for Respondent.

Kumaraswami Sastri, J.
Phillips, J.
1915 December, 6.

S. A. No. 1129 of 1914.

Civil Procedure Code of 1908—S. 102—Second appeal—Suit of Small Cause Nature—What is—Suit for possession of land or for rent—Decree for rent only—No appeal as regards claim for possession—Second appeal—Maintainability.

In determining whether a suit is a suit of a Small Cause Nature within the meaning of S. 102 of the Code of Civil Procedure, regard must be had to the suit as originally brought.

Where, in a suit for possession of land or in the alternative for rent, a decree for rent alone was passed and no appeal was preferred as regards the claim for possession, *held* that the suit was nevertheless not a suit of a Small Cause Nature and there was a right of second appeal.

A. Sundaram for Appellant.

P. V. Parameswara Aiyar for *C. V. Anantakrishna Aiyar* for Respondent.

Kumaraswami Sastri, J.
Phillips, J.
1915 December, 7.

S. A. No. 1424 of 1912.

Malabar Law—Karnavan—Karar by, with consent of junior members—Improper withholding of consent by one of the junior members—Effect—Revocation of karar by karnavan—Validity—Conditions.

A karar entered into by the karnavan and some only of the members of a Malabar Tarwad is a family karar if the other members consent to it. It does not cease to be a family karar because one of the members, for reasons of his own, does not join in or consent to it. The revocation of such a karar by the karnavan is invalid unless the revocation is made with the consent of the other members or unless it is for the benefit of the Tarwad.

C. V. Anantakrishna Aiyar (with him *P. V. Parameswara Aiyar*) for Appellant.

T. R. Ramachandra Aiyar for Respondent.

Sadasiva Aiyar, J.
Napier, J.
1915 December, 7.

C. M. P. No. 2789 of 1914.

Civil Procedure Code of 1908—*Applicability to Agency Tracts—Madras Estates Land Act—Suit under—Applicability to, of Civil Procedure Code—S.* 192 *of Estates Land Act—Effect.*

S. 192 of the Madras Estates Land Act is subject to the limitation contained in S. 1 of the Code of Civil Procedure 1908. The Code does not, therefore, apply even to suits under the Estates Land Act brought in the Agency Tracts.

B. Somayya for *P. Nagabhushanam* for Petitioner.

V. Ramesam for Respondent.

Sadasiva Aiyar and
Napier, JJ.
1915 December, 7.

C. M. A. No. 295 of 1915.

Guardian and Ward—Mahomedan Law—Shafi School—Minority, limits of—Indian Majority Act—Minor of the age of 16, *in the custody of grandmother—Right of father to apply under S. 25 of the Guardian and Wards Act—Wishes of minor, value of.*

Though under the Shafi school of Mahomedan Law, a minor on attaining the age of 15 is entitled to claim emancipation from guardianship, the question of his minority must be decided under Act IX of 1875. Consequently among Mahomedans belonging to the Shafi sect, a father is entitled to the custody of his minor son of the age of 16. I. L. R. 9 M. 391 followed.

A father is entitled to apply under S. 25 of the Guardian and Wards Act, for the custody of his minor son of about the age of 16, though the minor had all along been in the custody of his grandmother and never in the custody of his father.

The weight to be attached to the wishes of the minor, considered.

S. Srinivasa Aiyangar and *K. Rajah Iyer* for Appellants.

C. V. Ananthakrishna Iyer and *N. M. Malim Sahib* for Respondents.

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